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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1906.

No. 149.

JAY DELAMATER, PLAINTIFF IN ERROR,

vs.

THE STATE OF SOUTH DAKOTA

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA.

BRIEF FOR DEFENDANT IN ERROR

BY S. M. HOWARD,
State's Attorney of Potter County, South Dakota.
Attorney for Defendant in Error.

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Attorney for Defendant in Error.

2 STATEMENT OF THE CASE.

May it Please the Court:

At the March Term of the Circuit Court held in and for the county of Potter and state of South Dakota in the year 1904, the Plaintiff in Error was tried and convicted of the crime of selling intoxicating liquors by solicitating orders therefor at and within said county in quantities of less than five gallons each to persons who were not dealers in ardent spirits without having previously thereto obtained a license so to do. The information char-
3 ges that these sales were made on the 10th day of February, A. D. 1904.—(See Record, p. 11.)

The evidence and agreed statement of facts presented in the trial court show these sales were made to citizens of said county of Potter for future delivery, on sixty days' time; and also, that the plaintiff in error claimed to act on behalf of a firm located in the city of St. Paul in the State of Minnesota.—(See Record, p. 2.)

The plaintiff in error was duly convicted of the

* Thereupon, the Plaintiff in Error carried the case by Writ of Error to the Supreme Court of South Dakota where, on August 22, 1905, the judgment rendered in the trial Court was affirmed; whereupon, the original Defendant brought the case to this most Honorable Court by Writ of Error.

crime charged in the information and duly sentenced
4 by the trial court to pay a fine of two hundred and fifty dollars; and that, in default of such payment, he be confined in the county jail of said county of Potter for the period of one hundred and twenty-five days,—the same being one day for every two dollars of said fine, or until said fine be paid.—(See Record, p. 17.)

Strangely enough, the facts which constitute the commission of the crime charged in the information, on which plaintiff in error was found guilty and sentenced, are not in anywise disputed or denied. The evi-
5 dence was too conclusive to admit of successful contradiction. On the contrary, the facts charged in the information in the trial court all stand admitted by the plaintiff in error.—(See Record, p. 25.)

It is also admitted by counsel for plaintiff in error in the trial court, that the facts thus both proven and admitted constitute an open violation of §2834 of the Revised Political Code, 1903, of the State of South Dakota, commonly known as the License Law.—(See Record, p. 26.)

But it is proper here to state that the attorney for
6 plaintiff in error in the trial court contended that said section of the Revised Code of South Dakota was in conflict with the powers of congress and of §8, Art. 1, of the Federal Constitution.—(Record, p. 26.)

Briefly stated, these constitute the facts involved in the case at bar.

ARGUMENT.

Although the case at bar, so far as the plaintiff in error is concerned, involves the imposition of a fine of $250.00 only, which is certainly a matter of no tran-
7 scendant importance, yet, so far as the State of South Dakota is concerned, and the people of the United States generally, it also involves the underlying principles of our whole system of Federal and State governments, and more especially, a careful consideration and construction of §8 of Art. 1 of the Federal Constitution. It may thus readily be seen that the case at bar, in reality,

is one of vast importance and cannot receive too careful consideration by this most honorable court. This should certainly be borne in mind always, even from the
8 beginning.

For the purpose of a clear consideration of the law governing the case at bar, the argument thereof will be presented under the following subdivisions, to-wit:

I.—The original powers of each of the several States to Regulate, Control or Prohibit the Traffic in Intoxicating Liquors.

II.—The power of Congress to Regulate, Control or Prohibit the Traffic in Intoxicating Liquors within the limits of the sev-
9 **eral States of the Union, outside of the District of Columbia, Military Reservations and other places within the exclusive jurisdiction of the United States. And of these:**

1.—The powers of Congress from the convening of the first continental Congress in October, 1765, onward till February 4, 1887, the latter be-
10 **ing the date of approval of the Act to Regulate Commerce with foreign countries and Inter-State, commonly known as the Inter-State Commerce Act. And,**

2.—The power of Congress from and after the passage and approval of the Inter-State Commerce Act, February 4, 1887, onward to August 8, 1890, the date of the Act to Limit the Effect of the Inter-State Commerce
11 **Act, commonly known as the Wilson Act. And,**

3.—The power of Congress to Regulate,

Control or Prohibit the Traffic in intoxicating Liquors within the limits of the several States of the American Union since the passage and approval of the Wilson Act.

III.—The power of the several States of our Republic to Regulate, Control or Prohib-
12 **it the Traffic in Intoxicating Liquors within the limits of each from the date of the approval of the Wilson Act, August 8, 1890, onward to the present time.**

IV.—Assignments of Error by Plaintiff in Error.

And these divisions will be taken up in the foregoing order.

13 1.

1. The Original powers of each of the several States to Regulate, Control or Prohibit the Traffic in Intoxicating Liquors.

When the original States won their independence from Great Britain, which was acknowledged by the treaty of Paris, Sept. 3, 1783, they thereupon became both sovereign and independent. Bear well in mind always, that it was the *States* which then became sovereign and independent, and not our *Government* under the con-
14 stitution, for that was not inaugurated till the 4th of March, 1789, or nearly six years subsequent to the treaty of Paris, by means of which the sovereignty of the States became assured. And if the several States became sovereign then, and continue to exist to the present time, they must be sovereigns still, except as to those matters only over which their sovereignty has been reliequished or

surrendered. This is a proposition of logic which admits of no argument.

The next inquiry which naturally follows is,
15 Have the several states ever surrendered their sovereignty, or any part or portion of the same? And if so, When and where was such surrender made? Who made the surrender? To whom was it made? And who were present?

These are the *all-important questions* for this most honorable Court to determine in the case at bar; for thereon hang the decisive issues of this cause.

If the entire sovereignty of the original States, or any portion of such sovereignty, has ever been sur-
16 rendered, relinquished or ceded, such surrender, relinquishment or ceding must have taken place either at the time of the adoption of the Articles of Confederation in 1781, or at the time of the adoption of the Federal Constitution in 1788, or some of the amendments thereto; for it could not have been accomplished on any other occasion.

This leads us, in the first place to a careful consideration of The Articles of Confederation, adopted by the several States in 1781.

17 In construing this organic act, "We must not lose sight of the fact, "says Judge Sanborn, "That the sole object to be sought, in the interpretation of a law, is the *intention* of the legislative body which enacted the law; and that rules of construction are only serviceable as they assist us to attain that object."

In re Clerkship of C. Ct., 90 Fed. 251;
Kohlsaat v. Murphy, 96 U. S. 160;
Butler v. Russell, 3 Clif. (U. S.) 255;
Budd v. Budd, 59 Fed. 741;
18 Rogers v. Nashville, etc., R. Co., (C. C. A.), 91 Fed. 322.

The controlling rule of decision in applying a statute in any particular case is that, whenever the *intention* of the legislature can be discovered from the words

employed, in view of the subject matter *and all the surrounding circumttances,* it ought to prevail, unless it leads to absurd or irrational conclusions.

1 Fed. Stat. Ann. xxii;

Per Justice Clifford, Kohlsaat v. Murphy, 96
19 U. S. 160.

Always keeping the foregoing rules of construction well in mind, as to the *intention* of the States, let us examine with care and research all the surrounding circumstances which led the 13 original States onward to the adoption of the Articles of Confederation, sometimes called the Old Constitutinn.

It should be remembered always, that the Articles of Confederation were finally adopted after long and serious debate and discussion; and also that, for a long per-
20 iod of time during that discussion, it was a very serious question whether they would ever be adopted.

A committee to draft the Articles of Confederation was appointed by the Continental Congress on the 12th day of June, 1776.

8 Fed. Stat., p. 7, Note.

Upon the report of this committee, the Articles were debated, from time to time, till the 15th day of November of the following year, when they were submitted to the legislatures of each State. They were thereup-
21 on discussed over again thoroughly by the members of the legislature of each State for a protracted period of-four years before their final adoption,

8 Fed. Stat. p, 7, Note.

The several States were certainly exceedingly jealous of their sovereign powers. This was the great bone of contention. This was the rock on which the ship of state came very near foundering. They wished and longed for a common goverament, but each state feared to yield to that common government any of its sovereign pow-
22 ers. But after five years consumed in discussion, they finally yielded to the Confederation a very few of those powers, all of which were clearly defined.

So jealous were the several States on this point that, the first provision they made in the Articles of Con-

federation, after providing for the style of the confederacy, was the insertion of the following comprehensive restriction upon the powers of sovereignty of the government thereby created, to-wit:

"Each State retains its sovereignty, freedom and in-
23 dependence, *and every power, juridiction and right, which is uot by this confederation* expressly delegated to the United States in Congress assembled."

Mark well this important factt: That it was only subject to the foregoing comprehensive restriction upon the powers of the Federal Congress that the States would proceed a single step in the surrender of any portion of their respective sovereignties.

Hence it follows that *"Every power, jurisdic-*
24 *tion and right, which is not by this Confederation expressly delegated to the United States in Congress assembled;* was then and there reserved to the States respectively.

The Articles of Confederation remained in full force till the adoption of our Constitution, June 21, 1788, covering a period of 7 years, 3 months and 20 days.

Van Brocklin v. Tennessee, 117 U. S. 159.

And from that time onward to the present moment, they still remain in force, except as otherwise provided
25 in the Federal Constitution.

I challenge the learned counsel for the plaintiff in error to point out the section in the Articles of Confederation which contain any delegation of tha *police powers* of any of the several States to the Congress, Oo the contary, it is perfectly apparent that the seveaal States retained each and all of their police powers, and that they never would have consented to the confederation without retaining same intact.

But the people of the several States soon discovered
26 they had created no Federal government, –that is,–no government with power to govern.

The Articles of Confederation provided for no chief executive, no cabinet, no Federal army, no commander-in-chief thereof, witeout the consent of nine States, no power to

raise revenue, no Federal Judiciary or Supreme court. In fact, the Articles of Confederation did not pretend to create a Federal government, but only a League. for Art. III provides:

"The said States hereby severally enter into a
27 firm league of friendship with each other," etc.

From the foregoing, it becomes perfectly apparent that the several States parted with none of their police powers when they adopted the Articles of Confederation. If this be true, then there is but one other instance when and where they could have surrendered them. and that was by the adoption of our present Federal Constitution or some of the amendments thereto; and we will now proceed to examine that organic law and ascertain whether that contains any delegation of the police powers of the sev-
28 eral States.

In examination into the present Federal Constitution, the first thing always to be borne in mind is, that the government of the United States is of *delegated* powers only and that it possesses no inhererent powers whatever; for it is the creature of the people of each of the several States States by States and not of the people of the Republic at large.

"The powers not delegated to the United States by the Constitution, or prohibited by it to the States.
29 are reserved to the States respectively, or to the people. "–(Art. X, Federal Constitution.)

Although the foregoing Article constituted no part of our present constitution, when first adopted, yet it never would have been adopted, if it had not been well understood that this article was soon to be added thereto.

2 Bancroft His. Constitutior U S., 269.

Art. X, Federal Constitution.

Before the State of Massachusetts would consent to the adoption of the Federal Constitution, that State
30 insisted on the addition thereto of the following specific amendment which, in substance, constitutes Art. X, to-wit:

"All powers not expressly delegated to Congress, are

reserved to the several States."

2 Banc. His. Const. U. S. 269;

2 Elliott, Debates on Federal Const. 177.—*

And the State of New York was still more tenacious on this point, for that State reserved the right to withdraw from the Union, after a specified number of years,
31 unless the following amendment, now embraced in Art. X, should also be incorporated in the Constitution, to-wit:

"*Provided,* That no power shall be exercised by Congress, but such as is expressly given by this Constitution; and all others, not expressly given, shall be reserved to the respective States, to be by them exercised."

2 Elliot, Debates Federal Const. 406.

The State of Pennsylvania also took a similar stand, for in the State convention held at Harrisburg, Sept. 3,
32 1888, the following provision was adobted, to-wit:

"That Congress shall not exercise any powers whatever, but such as are expressly given to that body by the Constitution of the United States; nor shall any authority, power or jurisdiction be assumed or exercised by the executive or judiciary departments of the Union under color or pretence of construction or fiction; but all of the rights of sovereignty which are not by the said Constitution expressly and plainly vested in the Congress, shall be deemed to remain with, and shall be exercised by, the several
33 States in the Union, according to their respective constitutions: and that every reserve of the rights of individuals, made by the several constitutions of the States of the Union, to the citizens and inhabitants of each State respectively, shall remain inviolate, except so far as they are expressly and manifestly yielded or narrowed by the national Constitution."

2 Elliot, Debates Federal Const. 545.

And the Maryland Constitutional Convention which met at Annapolis, April 21, 1788, unanimously adopted
34 the following:

"That Congress shall exercise no power but what is expressly delegated by this Constitution."

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* All references herein to Elliots's Debates refer to the Lippincott Edition of 1901.

2 Elliot, Debates Federal Const, 550.

The Constitutional Convention of Virginia, on the 27th day of June, 1788, proposed the following amendment:

"That each State in the Union shall respectively retain every power, jurisdiction and right which is not by this Constitution delegated to the Congress of the United States, or to the departments of the federal government."

3 Elliott, Debates Fed. Const. 659.

The Constitutional Convention of North Carolina, on the 1st day of August, 1788, also adopted the last preceding proposed amendment *et literatim.*

4 Elliott, Debates Fed. Const. 244.

In the South Carolina Convention, Aug. 1, 1788, the committee proposed the following amendment:

"1.–That each State in the Union shall respectively retain every power, jurisdiction and right which is not by this Constitution delegated to the Congress of the United States, or to the departments of the Federal government."

4 Ellliot, Debates Fed. Const. 244.

I have been unable to find anything like a complete record of the proceedings in the constitutional conventions of any of the other States; but think it safe to assume that all thereof joined in with the foregoing enumerated States in favoring the adoption of the Xth amendment to the Federal Constitution, and that, without this understanding, the Constitution would never have been ratified by the States; and hence, never would have become the organic law of the land.

Bear in mind always that the first ten amendments to the Federal Constitution were made in full pursuance of the foregoing recommendations of the several States, and that they were proposed at the first session of Congress under the Constitution and were adopted soon afterward.

Relative thereto, a learned historian says:

"The first group, including ten amendments, made immediately after the adoption of the Constitution, ought to be regarded as a supplement or postscript to

it, rather than as changing it."

4 Patton His. U. S. 104.

From all of which it is most clearly shown that Art. II, of the Articles of Confederation, hereinbefore set forth *hec verba*, was the chief corner-stone of both the Articles of Confederation and the Federal Constitution.

Hence it clearly follows, as certainly as night the day, that the States retained each and all their un-
39 limited powers so sovereignty, excepting those only which were 'Expressly delegated to Congress."

I call upon the learned counsel for plaintiff in error to show this Court, from either the Articles of Confedaration or the present Federal Constitution, a single clause wherein any portion of the original police powers of the several States was ever *expressly* ceded or surrendered by the States to Congress.

And it certainly needs no argument to prove that unless so ceded or surrendered, the several states
40 still retain all their original police powers, and that Congress never had, and never can have, any jurisdiction or control thereof.

Hence it follows that, in entering on a consideration of the delegated powers of Congress, we should always keep before us and bear well in mind, this important restriction to the jurisdiction of Congress, without which said restriction the several States would never have entered the Confederation, and without which, our present Constitution would never have been ratified by the States and
41 without which, the Federal Congress would never have had any jurisdiction or power to legislate upon any subject whatever.

Bear well in mind always, that the several States became sovereign long before the Congress under the Constitution was ever authorized, existed or had a being. Bear well in mind also, that the power which wrenched that sovereignty from Great Britain, was the same power which created the Articles of Confederation, the new Constitution

and the amendments thereto, and also the Congress
42 and Government of the United States of America.

It is certainly a proposition of logic too clear for discussion here that the *creature* cannot be superior to the *creator;* and this is just as true in temporal affairs as it is in theology. Hence follows this inevitable conclusion: *That the creature,—the Federal Government—cannot be superior to its creator—the several States—excepting as to those matters only which were expressly surrendered by the States to the Federal Government.*

43 Hence it follows that, inasmuch as the several States possessed every identical power of sovereignty when they threw off that of Great Britain, they still possess all these powers of sovereignty, except a very few which they surrender to the Federal Congress.

The question which next in order arises, so far as the case at Bar is concerned, is: Have the States ever surrendered to Congress the right to regulate, control or prohibit the traffic in intoxicating liquors within the jurisdiction of the State? And if so, I call upon the learned
44 counsel for the plaintiff in error to show us when and where the States have surrendered their power to Congress.

During the whole period of time which elapsed from the meeting of the first Continental Congress, October, 1765, onward to the ratification of the Article of Confederation in March, 1781; and from that time onward to March, 4th, 1789, when proceedings first began under our present Constitution,—embracing a period of 23 years 5 months,—I challenge the counsel for plaintiff in error to pro-
45 duce a single instance in which the Continental Congress either legislated or undertook to legislate upon the traffic in intoxicating liquors within the jurisdiction of any of the several States of the American Union. On the contrary it is a matter of universal notoriety that the annals of legislation of the Continental Congress, during all that

period of time are as silent as the tombs of the departed upon this question.

The foregoing facts and deductions would seem to
46 establish the fact beyond successful contradiction that the original right to regulate, control or prohibit the traffic in intoxicating liquors belonged expressibly to the States in severalty, and not to the Continental Congress.—

II—The power of Congress to Regulate, Control or Prohibit the Traffic in intoxicating Liquors within the limits of the several States of the Union, outside of the District of Columbia,
47 ## Military Reservations and other places within the exclusive jurisdiction of the United States.

And of these:

1.—The powers of Congress from the convening of the first continental Congress in October, 1765, onward till February 4, 1887, the latter being the date of approval of the Act to Regulate Commerce with foreign countries and Inter-State, commonly known as the Inter-State Commerce Act

The proposition that during this whole period of
48 time, to-wit: From October, 1765, onward to February 4,1887, the several States retained and exercised the right to regulate, control or prohibit the traffic and intoxicating liquors in their own way, independent of any outside control, is clearly established by an unbroken current of authorities, among which I cite the following:

United States

In re Raher, 140, U. S., 145 ;
Cunnini, v. Tillman, 54 Fed. Rep. 969;
49 Munn v. Illnois, 94 U. S., 113;
Bartemeyer v. Iowa, 18th Wall. 129;
Tanner v. Alliance, 29, Fed. Rep. 196;
Foster v. Kansas, 112, U. S. 205§
Eclenbocker v. Plymouth County, 134 U. S. 31;
Mugler v. Kansas, 123 U. S., 623;
Kansas v. Bradley, 26 Fed. Rep. 289;
In re Brosmhan, 18 Fed. Rep§ 62;
License cases. 5th Howe, 504:

50 Boston Beer Co. v. Massachusetts, 97 U. S. 25;
Crowley v. Christensen, 137, U. S., 86;

Georgia:

Howell v. State, 71 Ga., 225;
Pardue v. Ellis, 18 Ga., 586

Illinois:

Jones v. The People, 14, Ill., 196;
Kettering v. Jacksonville, 50th Ill., 39;
Schwuchow v. Chicago, 68 Ill., 444;
Swift v. Klein, 163 Ill., 269;

51 Indian Territory:

U. S. v. Cohn, 52 S. W. 38;

Iowa:

Kaufman v. Dostal, 73 Ia., 691;
McLain v. Bonn, 70 Ia., 752;
Craig v. Florange, 71 Ia., 761;
McLane v. Leicht, 69 Ia., 401;
Drake v. Kaiser, 73 Ia., 703;
Dickinson v. Heebe Brew. Co., 73 Ia., 705;

52 Santo v. State, 2 Ia., 165;
State v, Donchey, 8 Ia., 396.

Kansas:

State v. Lindgrove, 1 Kan. App., 51;
Haug v. Gillett, 14 Kan., 142 4/4
State v. Whisner, 35 Kan., 277;
Prohib. Amendment Cases, 24 Kan., 700;
Foster v. State, 22 Kan., 765;

Kentucky:

53 Stickrod v. Com. 86 Ky., 285;
Com. v. Weller, 14 Bush., 218;

Michigan:

People v. Gallagher, 4 Mich., 244:
People v. Hawley, 3 Mich., 330;

Missouri:

Austin v. State, 10 Mo., 591;

Nebraska:

Hunzinger v. State, 39 Neb., 652;

54 Shannon v. State, 39 Neb., 658;
Soehl v. State, 39 Neb., 659;

Rowels v. State, 39 Neb., 659;

Rhode Island:

State v. Fitzpatrick, 16 R. I., 185;
State v. Paul, 5 R. I., 185;
State v. Keenan, 5 R. I., 497;

North Dakota:

State ex rel Bartlett v. Fraser, 1 N. D., 425;

55 South Dakota:

State v. Brennan, 2 S. D., 384;
Territory v. O'Connor, 5 Dak., 397;
City of Elk Point v. Vaughn, 1 S. D., 108;
Minneapolis Brew. Co. v. McGillvray, 104 Fed., 252;

Vermont:

State v. Lovell, 47 Vt., 493;

Wisconsin:

State v. Ludington, 33 Wis. 107.

It is believed to be unnecessary to stop and argue
56 upon the many points which has been determined by our Courts of last resort, both State and Federal, in this long list of decision. So far as the case at bar is concerned, I simply wish to place on record this broad assertion: That throughout the whole period of the time covered by these cases, it is nowhere held or intimated that Congress had exercised, or had claimed the right to exercise, any authority on the part of the Federal Government to interfere in any way, or regulate in any way, the traffic in
57 intoxicating liquors within the jurisdiction of any one of the several States of the Union, prior to the passage of the Commerce Act, generally called the Inter-State Commerce Act, of February 4, 1887.

2.—The power of Congress from and after the passage and approval of the Inter-State Commerce Act, February 4, 1887, onward to August 8, 1890, the date of the Act to Limit the Effect of the Inter-State Commerce Act, commonly known as the Wilson Act.

58 If the position heretofore taken, to-wit: That the power to regulate the Liquor Traffic was never delegated or surrendered by the States to Congress, then it follows as a matter of course that Congress had no jurisdiction over the subject matter thereof, any more than it has over the questions of marriage and divorce, the Quarantine Laws, the Exemption Laws, the common rights to ownership of property, the right to regulate the punishment for burglary, larceny, murder, or any other offences against the criminal laws of the several States. And I apprehend it will not for one moment be contended by counsel for plaintiff in
59 error that Congress has or ever had, any jurisdiction or right to legislate upon, or control in any way, any of these specified subjects.

And up to the Passage of the Inter-State Commerce Act, it was never contended or seriously intimated by Congress that it had any authority whatever to legislate upon any of these questions.

But it is a matter of history as well as of common notoriety that, ever since the advent of the Civil War onward to the passage of the Wilson Act, there has
60 been prevailing in the popular minds a growing tendency to centralize the powers of the people more and more in the Federal Congress. This tendency to centralization has also produced an effect to a greater or less extent, upon our Courts of last resort, both State and Federal.

As a result of this growing tendency towards centralization, immediately after the passage of the Inter-State Commerce Act, it was strongly contended by the advocates of the centralized powers ofCongress that, in the passage of the Inter-State Act, Congress had assumed jurisdic-
61 tion of the traffic and intoxicating liquors within the jurisdiction of the several States; and the reupon, for the first time in the History of Federal Legislation, it was seriously contended that the power was conferred upon Congress by subdivision 3 of section eight of article one of the Federal Constitution to regulate the traffic in intoxicating liquors within the limit of the several States.

In pursuance of this growing tendency towards centralization, several decisions were rendered by some of
62 the State's Supreme Courts and by some of the District and Circuit Courts of the United States holding, in substance, that by the adoption of the Inter-State Commerce Act, Congress had assumed jurisdiction of the legislature upon the traffic in intoxicating liquors within the jurisdiction of the several States; and hence that the States could not control the same during the period of time between the passage of the Inter-States Commerce Act and the passage of the Wilson Act. Among the cases so holding I cite the following:

63 State v. Hannaphy (Iowa) 90th N. W. 601;
Megler v. Kansas, 123 U. S., 662;
Boston Beer Co. v. Massachusetts, 97 U. S., 25;
State v. Frappart, 31 La., Ann. 340;

Bear in mind always that these decisions cover the period of time only between the passage of the Inter-State Commerce Act February 4, 1887, and the passage of the Wilson Act, August 8, 1890. From these decisions it may readily be seen that some of our Courts were holding, throughout this period of time, that Congress had
64 the exclusive right to regulate and control the traffic in intoxicating liquors, in persuance of the said Commerce Clause of the Federal Constitution. The position, as we shall see further on, was not justified by the organic law of the land.

In reviewing the whole History of legislation upon this subject, both State and Federal, it becomes perfectly apparent to the eye of reason that, in the passage of the Inter-State Commerce Act, it was not the intention of Congress to interfere with the police powers of the
65 State to control the traffic in intoxicating liquors; for no sooner had it become apparent that a contrary construction was being placed upon the Inter-State Commerce Act by some of the Courts, both State and Federal, than Congress itself came to the rescue in a most effective way by the passage of the Wilson Act, defining and limiting the scope of the Inter-State Commerce Act.

III—The power of Congress to Regulate Control or Prohibit the Traffic in in toxicating Liquors within the limit of the several States of the American Union since the passage and approval of the Wilson Act August 8th 1890.

67 The position then taken by some of our State Courts and by some of the lower Federal Courts, holding that under the Inter-State Commerce Act, Congress had assumed jurisdiction over Inter-State traffic in Intoxicating Liquors, and hence that the State Legislatures had been thereby deprived of their original police powers, which they had theretofore exercised continuously from 1765 down to that date to regulate, Prohibit and Control the traffic in intoxicating liquors within their own respective jurisdictions, at once aroused a spirit of dissatisfaction and
68 dissent from one end of our Republic to the other; for if correct, it went to establish the doctrine that the people of the States, by this unwarranted assumption of power by Congress, were now for the first time deprived of their right to control the traffic in intoxicating liquors.

Harrell v. Speed, (June 4th, 1904) 113 Ten. 224; 1 L. R. A. (N. S.) 639.

By many good people it was looked upon as a most dangerous invasion of the rights of the States to protect themselves from the effects of one of the most gigantic
68 evils which had ever prevailed in this country. It was also everywhere looked upon as the most unwarranted interference by Congress,—if such had been the intent of Congress,—with the police powers of the respective States, which the States had always exercised continuously before the creation of Congress and onward to the date of that Act.

This broad-spread spirit of dissent and dissatisfaction with the supposed unwarranted assumption of power, soon produced its effect even upon Congress itself,
69 and resulted in the speedy passage by Congress of

"An Act to limit the effect of the regulations of Commerce between the several States and with foreign countries in certain cases," which provides as follows to-wit:

"That all fermented, distilled or other intoxicating liquors or liquids transported into any State or Territory, or remaining therein for use, consumption, sale or storage, therein, shall upon arrival in said State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers
70 to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." (3 Fed. Statutes Annotated, 853;26 Stat. L.313).

This constitutes what is generally known as the Wilson Act, and was evidently passed for two purposes, to-wit: First, for quieting the rising indignation of the people heretofore referred to; and second, to limit and define the *intention* of Congress in the exactment
71 of the Inter-State Commerce Act.

It would seem to appear conclusively from this Wilson Act that, in the enactment of the Inter-State Commerce Act, Congress never intended for one moment to interfere with the well established rights of the States to regulate the Traffic in intoxicating liquors within their own jurisdiction; for it declares that, on "arrival in such State or Territory," such intoxicating liquors shall "be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to
72 the same extent and in the same manner as if those liquids or liquors had been produced in such State or Territory." And it needs no argument to show that if the intoxicating liquors in question in the case at bar, had been produced in the State of South Dakota that it would have been subject exclusively to the laws of that State; and that, in such case, no one would have claimed that the Inter-State Commerce Act had anything whatever to do with the

transaction. Hence it follows that, in the passage of the Inter-State Commerce Act, Congress never intended
73 to meddle or interfere with the police power of the respective States, or with the right to control, regulate or prohibit the traffic in intoxicating liquors within their respective limits.

Bear in mind also that in the passage of the Wilson Act Congress expressly declares that the traffic in intoxicating liquors comes within the exercise of the police powers of the States. Here is a declaration by Congress itself that the traffic in intoxicating liquors comes within the exercise of the police powers of the respective States. And
74 if this be true then it follows too clearly for argument of the contrary, that Congress never had any right to legislate upon this subject; and that, if it undertook so to do, the Act would be unconstitutional and void.

Hence it follows that all these and other decisions of our Courts granted during the period of time intervening between the passage of these two Acts of Congress, swept away entirely by the passage of the Wilson Act. In other words, the holding of these decisions fall to the ground by the passage of the latter Act, just as the woodman
75 falls the trees of the forest.

The purpose of Congress in enacting this statute was clearly to allow the State Laws to operate upon intoxicating liquors shipped into one State from another, notwithstanding it remains in the original package.

In re Rahrer (1891) 140 U. S., 545;
Rhodes v. Iowa (1898) 110 U. S., 412;
Vance v. Vandercook Co. (1898) 170 U. S., 445;
Minneapolis Brewing Co. v. McGillivray, (1900) 104 Fed., 258;
76 In re Bergan (1900) 115 Fed. Rep., 329;
Jervey v. The Carolina (1895) 66 Fed. Rep., 1013;
Lottery Cases (1903) 188 U. S., 361;
Fred. Miller Brewing Co. v. Stephens (1897) 102 Ia. 60.

No sooner had the Wilson Act become a law than it was assailed by the entire liquor interests of the country at large upon the ground that it was an unconstitutional

attempt to delegate through the State the power to regulate Inter-State Commerce; but the constitutionality of the Wilson Act has been completely upheld and maintained by
77 many decisions of our Courts of last resorts among which I cite the following:

In re Spickler, (1890) Fed. Rep., 653;
In re Van Vliet, (1890) 43 Fed. Rep., 761;
In re Rahrer, (1891) 140 U. S., 545;
State v. Fraser, (1891) 1 N. Dak., 425;
Com. v. Clahane, (1891) 154 Mass., 116;
Rhodes v. Iowa 170 U. S., 412;
Vance v. Vandercook, Co., 170 U. S.;
State v. Fraser (1891) N. D., 425;

78 It was also contended by those representing the liquor interest of the country, that, in order for the States to be able to control the traffic in intoxicating liquors within their borders, it was necessary for the legislature of the States to enact new laws subsequent to the passage of the Wilson Act, in order to carry the provisions of the latter law into effect; but this contention, like the former one, has been made completely explicit by many decisions of our Courts, among which I cite the following:

In re Rahrer (1891) 140 U. S., 545;
79 Enert v. Missouri, (1895) 156 U S., 321;
In re Spickler, (1890) 43 Fed. Rep. 653;
In re Van Vliet, (1890) 43 Fed. Rep., 761;
In re Jordan, (1892) 49 Fed Rep,, 238;
Tinker v. State, (1890) 90 Ala., 638;
Fred Miller Brewing Co. v. Stevens, (1897) 102 Ia., 60;
Com. v. Calhane, (1891) 154 Mass., 115,
Com. v. Gagne, 150 Mass., 205;
80 State v. Fraser, (1891) 1 N. Dak., 425;
State v. Lord (1891) 66 N. H., 479;
Starace v. Rossi (1897) 69, Vt., 303.

It was also contended by the same interest that liquors imported into a State *before*, but sold *after*, the

enactment of the statute, was not subject to the State Laws. But this position, like the former two, was completely upset by the following decision:

Tinker v. State, (1890) 90 Ala., 638.

81 We have heretofore insisted throughout this argument that the several States of the Union originally possessed the power to regulate, control or prohibit the traffic in Intoxicating Liquors prior to the adoption of either the articles of Confederation or our present Constitution, and that they have never surrendered that power or delegated the same to Congress; and in support thereof, and for the purpose of showing beyond all controversy that no new powers were conferred upon the State by the Wilson Act, but that that Act was simply a recognition

82 that the several States always had possessed and always had retained this power, I cite the following authorities:

In re Rahrer, (1891) 140 U. S., 564;
Rhodes v. Iowa, (1898) 170 U. S., 412;
Ex parte Edgerton, (1893) 59 Fed. Rep. 115;
In re Langford, (1893) 57 Fed. Rep., 575;
Jervey v. The Corolina, (1895) 66 Fed. Rep., 1013;
State v. Lord, (1891) 66 N. H., 479;
Corbin v. McConnell, (1902) 71, N. H., 352;

83 Wilkerson v. Rahrer 140 U. S., 574.

This long list of authorities establishes the fact beyond successful contradiction that no new powers were conferred upon the States by Congress in the passage of the Wilson Act; for if the power to regulate the traffic in intoxicating liquors had been conferred upon Congress by the National Constitution, it must follow that Congress could not confer that right upon the States, for that would certainly be a violation of the Constitution; and hence it conclusively follows that the States have always possessed,

84 from the Treaty of Paris in 1783 onward to the present time the power to regulate the traffic in intoxicating liquors within their respective borders in their own way and

subject to no restriction whatever on the part of Congress or the Federal Government.

That the importer of intoxicating liquors can sell only on the terms prescribed by the local statutes, is a question which appears to be settled by the following authorities:

Reymann Brewing Co. v. Brister, (1900) 179 U. S., 455;

85 Vance v. Vandercook Co. (1898) 179 U. S., 438;

In re Rahrer, (1891) 140 U. S., 545;

Minneapolis Brewing Co. v. McGillivray, (1900) 104 Fed. Rep., 258;

Indianapolis v. Bieler (1893) 138 Ind., 30;

Com. v. Calhane, (1891) 54 Mass., 116;

People v. Vorhies, Mich. (1902) 91 N. W., 624;

State v. Vixman, (1901) 162 N. O., 1;

State v. Lord (1891) 66 N. H., 479;

Eg. Loan & Sec. C. v. Edwardsville (1905) 38 So.

86 Reporter, 1016;

Pabst Brew. Co. v. Crenshaw (1905) 25 So. Reporter, 552.

Hence it must follow that if the importer of intoxicating liquors can sell only on the terms prescribed by local Statutes, the sales of intoxicating liquors charged in the information in the case at bar, must be governed by the Statue of South Dakota, to-wit: By Art. 6, Chapter 27 Political Code, 1903, which requires such vendor to have a license therefor and to pay a license fee of $200.00.

87 From the foregoing list of authorities, it can readily be seen that the supposed assumption of power by Congress, in the Interstate Commerce Act, to legislate upon the traffic of intoxicating liquors between the several States, is without foundation in fact: for this Court has held under the Wilson Act, that the several States remain in the same condition, so far as the regulation of the liquor traffic is concerned, that they held before the date of the passage of the Inter-State Commerce Act.

III.—The power of the several States of our Republic to Regulate, Control or Prohib-

88 **it the Traffic in Intoxicating Liquors**

within the limits of each from the date of the approval of the Wilson, Act August 8, 1890, onward to the present time.

After the foregoing long review of legislation and judicial construction thereof, extending from the beginning of the Independence of the States onward to the passage of the Wilson Act, it seems conclusively to appear that the
89 present Statute of traffic in intoxicating liquors, Inter-State or otherwise, remains to-day in precisely the same condition it occupied on the assumption of sovereignty by the original State; that is, that it still belongs to the police power inherent to the sovereignty of each of the several States of the American Union. This is certainly a great triumph for the welfare of the people at large; for if the right to regulate the police affairs of the States has been usurped by Congress and withheld from the legislature of the States, then there would have remained no pos-
90 sible way by means of which the Inter-State Traffic in Intoxicating Liquors could have been controlled by the State. This would have resulted in the repeal of more wise legislation upon this subject than Congress would be likely to enact for centuries to come; and I will not stop to portray the deplorable results which must have followed.

Let it suffice to premise that, if such had been the case, then our prohibition Statutes, and all Statutes regulating the traffic in intoxicating liquors within the several States, might just as well be tumbled into an immense
91 pile and consumed by fire; for they certainly would be of no further use.

If, then, our course of reasoning is found to be supported by the authorities cited, it must follow as a matter of course that the traffic in intoxicating liquors, Inter-State or otherwise, stands in precisely the same condition to-day that it occupied prior to the Inter-State Commerce Act. If this be true, it must also follow that the States still possess full sovereignty over this traffic; or, as has been conclusively shown, the several States have
92 always exercised jurisdiction over the subject matter from a period of time long prior to the adoption

of the Federal Constitution onward to the present moment. And it has also been shown that during the whole of this period of time Congress has never undertaken to legislate ubon this subject at all; for by the passage of the Wilson Act, Congress has declared that it did not intend to legislate upon the traffic of intoxicating liquors in the passage of the Inter-State Commerce Act; and this was the only instance in which it could be claimed with any show of success
93 that Congress had ever undertaken to legislate upon this question. And this long period of non-action by Congress, is a strong proof that Congress never had any authority to legislate upon this subject.

THE POLICE POWER OF THE STATES.

From the beginning of sovereignty in the several States after throwing off that of Great Britain, onward to the present time, the several States of the Union have continuously exercised the right to control their police affairs in the same manner that they have controlled their
94 more serious criminal affairs in general, always subject to no outside control. And it has never been seriously contended, prior to the passage of the Inter-State Commerce Act, that Congress had any right to legislate upon these affairs.

True enough it is, from time to time, there has arisen a difference of opinion between contending interests as to just what was included within the police power of the States; but whenever and wherever it has been once conceded that a given subject came within the legitimate police
95 powers of the States, this settled the whole question, and the jurisdictions of the States thereupon has been universally conceded up to the date of the passage of the Inter-State Commerce Act. Always heretofore the chief difficulty has been to define and determine the exact line of demarkation of the legitimate police powers. As this honorable court has said, "the intervening colors bebetween white and black flow into each other in such a manner, it is sometimes difficult to mark the bounduries of each. Very much likewise is it with the subjects of police
96 power and the rights of Commerce; and the great

difficulty and endless conflict of decision upon these questions has mostly arisen in determining that line of demarkation; for, when the boundaries thereof has been once defined, there has been but little in determining its true Status.

This boundary, so far as the Inter-State traffic in intoxicating liquors is concerned, was very clearly determined and defined by Mr. Justice Carton of this Court, so long ago as 1847, in delivering his opinion in what is
97 the "Liquor Case," reported in 5th Howard, page 569 et seq. In a case under consideration by this Court at that time, a barrel of gin had been purchased in Boston, Mass., by Pierce et al., of the State of New Hampshire, and had been brought coast-wise by water near to Dover, N. H., where it was sold in the same barrel and condition in which it had been purchased in Boston, in violation of the Statute of New Hampshire, which required the vendor of ardent spirits to procure a licence therefor engaging in the sale thereof. The defendants were duly convicted in the
98 State trial Court, which conviction was affirmed by the Supreme Court of the United States by virtue of a writ of error. In delivering the opinion of this Court in that cause, Mr. Justice Carton in part says:

"To a true understanding of the power conferred on Congress to regulate commerce among the States it may be proper briefly to confer as to their condition and acts before the Constitution was adopted, in this respect."

"And in regard to the third, (foreign and inter-state commerce) Congress has stood by for nearly sixty
99 years, and seen the States regulate the commerce of the whole country, more or less. at the ports of entry and at all their borders, without objection, and for this court now to decide that the power did not exist and that all they had done in this respect was void from the beginning, would overthrow and annul entire codes of State legislation on the particular subject. We would by our decision expunge more State laws and city corporate regulations than Congress is likely to make in a century on the subject, and on no better assumption than that Congress and State
100 Legislatures had been altogether mistaken as to their

respective powers for fifty years or more. **If long usage, general acquiescence, and the absence of complaint can settle the interpretation of the clause in question, then it should be deemed as settled in conformity to the usage of the Courts.**

"And as Congress and the courts have conceded that the States may pass laws regulating the militia, and on the subject of bankruptcies, and that the affirmative
101 grants of power to Congress in these instances did not deprive the States from exercising the power until Congress acted, it is now too late, under existing circumstances for this court to say that the similar affirmative power to regulate commerce with foreign nations and among the States shall be held an exclusive power in Congress; as it could no more be done with consistency of interpretation, than with safety to the existing state of the country.

"In proceeding on this moderate, and, as I think, prudent and proper construction, all further difficulty
102 will be obviated in regard to the admission of property into the States; this the States may regulate, so they do not tax; and if the States (or any one of them) abuse the power, Congress can interfere at pleasure, and remedy the evil, nor will the States have any right to complain. And so the Courts can interfere if the States asume to exercise an excess of power, or act on a subject of commerce that is regulated by Congress. As already stated, **It is hardly possible for Congress to deal at all with the details of this complicated**
103 **matter**

"This case before us presents a fair illustration of the difficulty; all venders of spirits produced in New Hampshire are compelled to be licensed before they can lawfully sell; this is not controverted, and cannot be. **To hold that the State license law was void, as respects spirits coming in from other States as articles of commerce, would open the doors to an almost entire evasion,** as the spirits might be introduced in the smallest divisible quantities that
104 the retail trade would require; the consequence of which would be, that the dealers in New Hampshire would sell only spirits produced in other States, and that the products of New Hampshire would find an unrestrained

market in the neighboring States having similar license laws to those of New Hampshire."

And Mr. Justice Catron concludes as follows:

"That the law of New Hampshire was a regulation of commerce among the States in regard to the article for selling of which the defendants were indicted and
105 convicted; but that the State law was constitutionally passed, because of the power of the State thus to regulate; there being no regulation of Congress, special or general, in existence to which the State law was repugnant.

"And for these reasons, I think the judgment of the State court should be affirmed."

License Cases, 5 How. 608–9.

And Mr. Justice Woodbury, concurring, states his reasons therefor in part as follows:

106 But this license is a regulation neither of domestic commerce between the States, nor of foreign commerce. It does not operate on either, or the imports of either, till they have entered the State and become component parts of the property. Then it has by the Constitution the exclusive power to regulate its own internal commerce and business in such articles, and bind all residents, citizens or not, by its regulations, if they ask its protection and privileges; and Congress, instead of being opposed and thwarted by regulations as to this, can no more interfere in it than the States
107 can interfere in regulation of foreign commerce. If the proposition was maintainable, that without any legislation by Congress as to the trade between the States (except as that in coasting, as before explained, to prevent smuggling), anything imported from another State, foreign or domestic, could be sold of right in the package in which it was imported, not subject to any license or internal regulation of a State, then it is obvious that the whole license system may be evaded and nullified, either from abroad or from a neighboring State. And the more especially
108 can it be done from the latter, as imports may be made in bottles of any size, down to half a pint of spirits or wines; and if its sales cannot be interfered with, and regulated, the retail business can be carried on in any small quantity, and by the most irresponsible and unsuita-

ble persons, with perfect impunity."

"From the first settlement of this country, and in most other nations, ancient or modern, civilized or savage, it has been found useful to discountenance excesses in the use of intoxicating liquors. And without entering
109 here into the question whether legislation may not on this as other matters, become at times intemperate, and react injuriously to the salutary objects sought to be promoted, it is enough to say, under the general aspect of it, that the legislation here is neither novel nor extraordinary, nor apparently designed to promote other objects than physical, social and moral improvement. On the contrary, its tendency clearly is to reduce family expenditures, secure health, lessen pauperism and crime, and co-operate with, rather than counteract, the apparent policy of the general government itself in respect to the disuse of ardent spirits.

"They aim, then, at a right object. They are calculated to promote it. They are adapted to no other. And no other, or sinister, or improper view can, therefore, either with delicacy or truth, be imputed to them."

"It is the undoubted and reserved power of every State here, as a political body, to decide, independent of any provisions made by Congress, though subject not to conflict with any of them when rightful, who shall compose its population, who become its residents, who its citizens, who enjoy the privileges of its laws and be entitled to their protection and favor, and what kind of property and business it will tolerate and protect."

License Cases, 5 How. 629.

And Mr. Justice Grier, concurring, states his reasons therefor, in part as follows:

"It has been frequently decided by this court, 'That the powers which relate to merely municipal regulations, or what may more properly be called internal police, are not surrendered by the States, or restrained by the constitution of the United States; and that consequently, in relation to these, the authority of a State is complete, unqualified and conclusive.' Without attempting to define what are the peculiar subjects or limits of this power, it may safely be afirmed, that every law for the restraint and punishment of crime, for the preservation of the public

peace, health, and morals, must come within this category."

"As subjects of legislation, they are from their very nature of primary importance; they lie at the foundation of social existence; they are for the protection of life and liberty, and necessarily compel all laws on subjects of secondary importance, which relate only to property, convenience or luxury, to recede, when they come in conflict or collision, "*salus populi suprema lex.*"

"If the right to control these subjects be 'complete, unqualified and exclusive' in the State legislatures, no regulations of secondary importance can supersede or restrain their operations, on any ground of prerogative or supremacy. The exigencies of the social compact require that such laws be executed before and above all others.

"It is for this reason that quarantine laws, which protect the public health, compel mere commercial regulations to submit to their control. They restrain the liberty of the passengers, they operate on the ship which is the instrument of commerce, and its officers and crew, the agents of navigation. They seize the infected cargo, and cast it overboard. The soldier and the sailor, *though in the service of the government*, are arrested, imprisoned, and punished for their offenses against society. Paupers and convicts are refused admission into the country. All these things are done, not from any power by which the States assume to regulate commerce or to interfere with the regulation of Congress, *but because police laws for the preservation of health, prevention of crime, and protection of the public welfare*, must of necessity have full and free operation, according to the exigency which requires their interference.

"It is not necessary for the sake of justifying the State legislation now under consideration to array the appalling statistics of misery, pauperism and crime, which have their origin in the use or abuse of ardent spirits. *The police power, which is exclusively in the States*, is alone competent to the correction of these great evils, and all measures of restraint or prohibition necessary to effect the purpose are within the scope of that authority. There is no conflict of power, or of legislation, as between the States and the United States; each is acting within its sphere, and for the public good, and if a loss of revenue should accrue to the United States from a diminished con-

sumption of ardent spirits, she will be the gainer a thousand fold in the health, wealth and happiness of the people."

License Cases, 5 How. 631,632.

And Mr. Chief Justice Taney, concurring, states his reasons therefor in part as follows:

"Upon the whole, therefore, the law of New Hampshire is, in my judgment, a valid one. For, although the gin sold was an import from another State, and Congress has clearly the power to regulate such importations, under the grant of power to regulate commerce among the several States, yet, as Congress has made no regulation on the subject, the traffic in the article may be lawfully regulated by the State as soon as it is landed in its territory, and a tax imposed upon it, or a license required, or the sale altogether prohibited, according to the policy which the State may suppose to be its interest or duty to pursue."

License Cases, 5 How. 586.

The foregoing extracts from the opinions of the judges of the Supreme Court of the United States in the famous License cases, have been inserted here at some length for this important reason: Because the complete opinions cover an area of 77 pages in 5 Howard; and hence, it would entail much labor on this Court thoroughly to investigate the opinions in detail, from alpha to omega. But if this Court has the time and disposition so to do, I trust it will be done; for herein hinges the fundamental principiples which underlie the case at bar.

The foregoing cases were decided in 1847, just forty years before the passage of the Inter-State Commerce Act. But the Supreme Court therein construes Sec. 8 of Art. 1, of the Federal Constitution, which gives to Congress its only power to regulate commerce with foreign countries, as well as Interstate. And hence, the Inter-State Commerce Act itself must be governed by this construction of the constitution which gives to Congress its only power to legislate upon this subject.

And I now pass on to a decision of the same Court in the case of Wilkerson v. Rahrer, decided at the October term, 1890, three years subsequent to the passage of the Inter-State Commerce Act, and three months subsequent to the passage of the Wilson Act; and I would call the especial attention of this court to the fact that, in this case,

thus decided subsequent to the passage of both said acts, the Supreme Court of the United States takes substantially the very same ground it had taken in the License cases forty-three years before.

In this case of Wilkerson v. Rahrer, it was agreed that Maynard, Hopkins & Co., are citizens and resident of the State of Missouri, and are partners doing business at Kansas City, State of Missouri, under the firm name of Maynard, Hopkins & Co; that said firm was doing a general business in Kansas City, Mo., in the sale of intoxicating liquors; that they do a general business of packing and shipping intoxicating liquors from their place of business in Kansas City, Mo., to various points in the State of Kansas and other States; that in June, 1890, said Maynard, Hopkins & Co. constituted and appointed the petitioner herein, Charles Rahrer, their lawful agent in the city of Topeka, Kansas, to sell and dispose of for them in original packages liquor shipped by said Maynard, Hopkins & Co., from the State of Missouri to Topeka, Kansas; that in July, 1890, said Maynard, Hopkins & Co. shipped to the city of Topeka, Kansas, from Kansas City, Mo., a carload of intoxicating liquors, packed by them and shipped from Kansas City, Mo., to Topeka, Kansas, to their agent, Charles H. Rahrer; that Charles H. Rahrer on the 9th day of August, 1890, offered for sale and sold one pint of whisky, which was a portion of the liquor shipped by Maynard, Hopkins & Co., as above stated; that said pint of whisky was sold in the same condition in which it was shipped from the state of Missouri, and received into the state of Kansas; that it was separate and distinct from every package of liquor so shipped, and was sold in the same package in which it was received, being securely enclosed in a wooden box of sufficient size to hold said pint bottle of whisky.

Rahrer was arrested for selling this liquor in violation of the laws of Kansas. It was contended in that case just as it is in this one, that the shipment and sale of the intoxicating liquor in question was governed and controlled exclusively by the Inter-State Commerce Act and Sec. 8 of Art. 1, of the Federal Constitution, and consequently that the prohipition statute of the state of Kansas was in viola-

tion thereof, and therefore null and void. In passing upon that question,—which is precisely the one at bar,—Mr. Chief Justice Fuller in delivering the opinion of the Court says:

"The power of the State to impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order and prosperity, is a power originally and always belonging to the states, not surrendered by them to the general government, nor directly restrained by the constitution of the United States, and is essentially exclusive.

"And this Court has uniformly recognized state legislation, legitimately for police purposes, as not in the sense of the constitution necessarily infringing upon any right which has been confided expressly or by intimation to the national government.

In short, it is not to be doubted that the power to make the ordinary regulations of police remains with the individual states and cannot be assumed by the national government, and that in this respect it is not interfered with by the 14th amendment.

"The power of Congress to regulate commerce among the several states, when the subjects of that power are national, is always exclusive. The constitution does not provide that Inter-State commerce shall be free, but, by the grant of this exclusive power to regulate it, it was left free except as for such restraints as Congress might impose."

"Unquestionable, fermented, distilled or other liquids or liquors are subjects of commercial intercourse, exchange, barter and traffic, between nation and nation, and between state and state like any other commodity in which a right of traffic exists, and are so recognized by the usages of the commercial world, the laws of Congress and the decisions of Courts. Nevertheless, it has been often held that State legislation which prohibits the manufacture of spirituous, malt, vinous, fermented or other intoxicating liquors within the limits of the State, to be there sold or bartered for general use as a beverage, does not necessarily infringe any right, privilege or immunity secured by the constitution of the United States or by the amendments thereto These cases, in the language of the opinion in Muggler v. Kansas rest upon the acknowledged right of the States of the Union to control their purely internal affairs, and in doing so, to protect the health, morals and safety of their

people by regulations that do not interfere with the execution of the powers of the general government, or violate rghts secured by the Constitution of the United States. The power to establish such regulatious, as was said in Gibbons v. Ogden, 22 U. S., 9 Wheat. 1, reaches everything within the territory or state not surrendered to the National Government.

"And here the sagacious observations of Mr. Justice Catron, in the License Cases, may profitably be quoted as they have often been before."

Wilkerson v. Rahrer, 140 U. S. 574.

And then follows a quotation from the License Cases hereinbefore cited and referred to, whereby the decision of that Court in the license cases is approved and confirmed.

Bear in mind that this decision, as before stated, was rendered subsequent to the passage of both the Inter-State Commerce Act and the Wilson Act, and holds that the decision in the License Cases is still applicable and governs the case at bar.

In 1891, the identical question involved in the case at bar came before the Supreme Court of North Dakota, and the syllabus by the Court in that case reads as follows:

"Held, further, since the passage by Congress of the law commonly known as the "Willson Bill," that sales of intoxicating liquors in violation of the prohibitory legislation of North Dakota, which are made in this State by a non-resident, through an agent living in this State, are unlawful sales, whether the liquor sold is or is not imported liquor, or whether it is or is not contained in the original cask or package in which it was shipped out of another State or Country.—In re Van Vliet, 43 Fed. Rep. 761; In re Spickler, Id. 653."

State ex rel Bartlet v. Fraser, 48 N. W. 343.

Justices Harlan, Brown and Gray in delivering their opinion in Rhodes vs. Iowa, 170 U. S. 425, use the following language:

"The regulation of the manufacture, sale and use of intoxicating liquors has always been recognized as a subject peculiarly appertaining to the police power of the several States respectively."

And they cite the following cases to sustain their

position: 46 U. S. 5th How. 504; Bartemeyer vs. Iowa, 85 U. S. 18; Boston Beer Co. vs. Massachusetts, 97 U. S., 25; Foster vs. Kansas. 112 U. S., 201; Kidd vs. Pearson, 128 U. S., 1; Eilenbecker vs. Plymouth County District Court 134 U. S., 31.

As a further instance of the rightful exercise of the police power of the State, I would call the attention of this Court to the act of the legislature of this State, passed at that last session thereof, relating to the inspection of oils. This Act requires that all mineral or petroleum oils or any fluid or substance which is the product of petroleum, or into which petroleum or any product of petroleum enters or is found as a constiuent element, whether manufactured in this State or not, shall be submitted to inspection as provided by the act before being offered for sale, and provides that the inspectors shall be entitled to demand or receive from the owner or person calling upon them, etc., the sum of forty cents for testing and marking a single barrel, etc.

Bear in mind always, that kerosine oil is certainly as good a subject of interstate commerce as intoxicating liquors, and is generally conceded to be a great deal more so.

According to the course of reasoning of the Attorney for the plaintiff in error, kerosene oils shipped into this State from any other State, constitutes a matter of Inter-State Commerce, and cannot be controlled or regulated by the legislatures of the respective States for that reason, because it is governed exclusively by the Inter-State Commerce Act; and this course of reasoning would certainly apply with vastly more reason and consistency to oils than to intoxicating liquors.

And yet the constitutionality of this act of our last legislature extending the police powers of this State over the subject of illuminating oils and requiring the same to be inspected, for the purpose of protecting the lives and property and safety of the people of this State against the introduction of dangerous oils, came up only a few months ago before Judge Carland, presiding Judge of the District Court of the United States, at Sioux Falls. It was then and there claimed, just as in the case at bar, that illuminating oils constitute a legitimate subject of Inter-State Commerce;

and that, as such was covered and controlled exclusively by the Inter-State Commerce Act; and hence, that the act of legislation of this State, requiring that such oils should be subjected to inspection, was in violation of the Inter-State Commerce Act, and hence, that it is unconstitutional and void, just as it is claimed in the case at bar, that intoxicating liquors constitute a matter of Inter-State Commerce, hence, can be regulated only by Congress, under the powers thereof derived from the Commerce provision of the Federal Constitution before referred to.

But Judge Carland held,—just as the Supreme Court held in the License Cases, hereinbefore cited,—that an article of commerce which came within the legitimate police powers of the State, could properly be regulated and controlled by the legislature of this State, notwithstanding the Inter-State Commerce Act and the provisions of the Federal Constitution before referred to; and he also held that, in order to protect the property and lives and welfare of the people of the State, the legislature of this State had the right to provide for the inspection of oil and upheld the statute of this State, making provisions therefor.

In fact, there appears to be no end to the authorities holding that, when a given subject comes within the proper police powers of the State, the State has the absolute power to regulate and control it in such a way as best to promote the welfare of its people. All the authorities which have been heretofore cited,—and an almost infinite number of others which might be cited,—go clearly to establish this important poimt.

In the language of Chief Justice Fuller, "The power of the State to impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order and prosperity, *is a power originally and always belonging to the State, not surrendered by them to the general government, nor directly restrained by the constitution of the United States, and is essentially exclusive.*"

Bear in mind always, that the foregoing is the lan-

guage of the Chief Justice of the Supreme Court of the United States in delivering his opinion in Wilkerson v. Rahrer, 140 U. S. 574, hereinbefore cited and referred to. What stronger language than this, and from what better authority, could be used to sustain the position of the Defendants in Error in the case at bar?

And again: For the purpose of showing that the several States have always exercised their police powers in requiring licenses of all parties engaging in the traffic of intoxicating liquors, I will cite the following authorities, to-wit:

United States:

Crowley vs. Christensen, 127 U. S., 86;
U. S. vs. Roman, 33 Fed. Rep. 117;
Gray vs. Conn., 159 U. S., 74;
License Tax Cases, 5th Wall. (U. S.), 462;
Miller vs. Ammon, 145 U. S., 421;
Giozza vs. Tiernam, 148 U. S., 657;
Kidd vs. Pearson, 128 U. S., 1;
Reyman Brew Co. vs. Bristor, 92 Fed. Rep. 17.

Arizona:

Territory vs. Connell, 16 Pac., 209.

California:

Matter of Cuerrero, 69th Ca., 88.

Illinois:

Dennehy vs. Chicago, 120 Ill., 627.

Indiana:

Haggart vs. Stehlin, 137 Ind., 42;
Thommason vs. State, 15th Ind., 449;
O'Dea vs. State, 57 Ind., 31.

Kentucky:

Mason vs. Lancaster, 4 Bush., 406.

Louisiana:

State vs. Boston Club, 45 La., Ann., 585;
State vs. Mattle, 48 Ala. Ann., 728.

Maryland:

Teller vs. State, 11 Md., 525.

Massachusetts:

Comm. vs. Fredricks, 119 Mass., 199:
Comm. vs. Bennett, 108 Mass., 27;
Comm. vs. Martin, 108 Mass., 29 note;
Comm. vs. Blackington, 24 Pick., 352.

Michigan:

Wolfe vs. Lansing, 53 Mich., 367;
Kittson vs. Ann Arbor, 26 Mich., 325.

Minnesota:

Rochester vs. Upman, 19 Minn., 108;
Winona vs. Whipple, 24 Minn., 61;
State vs. Cook, 24 Minn, 247.

New Hampshire:

Pierce vs. State, 13 N. H., 536.

New York:

Ingersoll vs. Skinner, 1 Den., 540.

Pennsylvania:

Doberneck's Application, 35 Pa., L. J., 476;
Boyle's Retail Liquor License, 190 Pa. St.

Rhode Island:

State vs. Peckham, 3 R. I., 289.

South Carolina:

Charleston vs. Ahrens, 4 Strodh. L. 241.

South Dakota:

State vs. Brennan, 5 S. D., 384, 50 N. W., 625;
Territory vs. O'Connor, 2 Dak., 397, 41 N. W., 746,
City of Elk Point vs. Vaughn, 1 S. D., 108; 46 N. W., 577;
Minn. Brewing Co. vs. McGillivray, 104 Fed. 252;
State vs. Delamater, (This case) 104 N. W., 537, (1905).

Vermont:

Bancroft vs. Dumas, 21 Vt., 456.

Wisconsin:

State vs. Ludington, 53 Wis., 107;
Tenney vs. Lenz, 116 Wis., 566.

In the case of Pabst Brewing Co. Appt. vs. Crenshaw et al, decided by this Honorable Court so recently as April 17, 1905, involving a statute of the State of Missouri imposing an inspection fee upon beer or other malt liquors shipped from other states into the state, and held there for sale and consumption therein, Mr. Justice White in delivering the opinion of this Court says;

"The subject with which the statute deals is beer and other malt liquors. Plainly, it operates upon such liquors only when manufactured in the State, or, if shipped from other States, after their arrival in the State, and when they are held there for sale and consumption therein.

"It was provided by the act of Congress, commonly styled the Wilson Act (26 Stat. et L. 313, Chap. 728, U. S. Comp. Stat. 1901, p. 3177) as follows:

"'That all fermented, distilled or other intoxicating liquidsor liquors transported into any State or Territory, or remaining therein for use, consumption, sale or storage therein, shall, upon arrival in such State or Territory, be subject to the operation and effect of the laws of such State or Territory *enacted in the exercise of the police powers,* to the same extent and in the same manner as though suchliquidsor liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.'"

"The scope of this act and the power of Congress to adopt it, was passed upon in the Re Rahrer (Wilkerson vs. Rahrer) 140 U. S., 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865.

The scope of the act thus stated (P. 565 L. ed. p. 576, Sup. Ct. Rep. p. 868:

"'Congress has now spoken and declared that imported liquors or liquids shall, upon arrival in a State, fall within the category of domestic articles of similar nature.'

"It was decided that, although the act had the effect as stated, it was not repugnant to the constitution of the United States, the Court saying (4562, L. ed. p. 572, Sup. Ct. Rep. p. 869).

"'No reason is perceived why, if Congress chooses to provide that certain designated subjects of Inter-State Commerce shall be governed by a rule which devests them of that character at an earlier period of time than would otherwise be the case, it is not within its competency to do so.'

* * * * * * *

"Quite recently, at this term, in American Exp. Co. vs. Iowa. 196 U. S. 133, ante, 182, 25 Sup. Ct. Rep. 182, and Adams Exp. Co. vs. Iowa, 199 U. S., 147. ante, 185, 25 Sup. Ct. Rep., 185, the construction affixed to the Wilson Act in the previous cases was applied, and the power of the State of Iowa to control the sale of liquors shipped from another State into that State, after their delivery to the consignee, was upheld.

"Applying the Wilson Act and the decisions thereunder to the statute here assailed, we think it clear that the contention *that it is repugnent to the Commerce clause of the Constitution is without merit,* unless the reasons urged to show that the present case is not within the scope of the Wilson Act be well founded. We proceed to consider the contentions relied on to establish that proposition.

"1st.—The Wilson Act, it is argued, subjects liquors shipped from one State into another, after their arrival at their destination only, to the 'laws of such state or territory enacted in the exercise of its police powers.' As, it is said, the law of Missouri was not enacted in the exercise of the police power, hence malt liquor received from another State and held in Missouri for sale, retained its character as an article of Inter-State Commerce until sold in the original package.

"In giving the commercial power to Congress, the States *did not part* with that power of self-preservation which must be inherent in every organized community."—Mr. Justice McLean, in Passenger Cases, 7 How. 740.

"And neither the power itself [Police Power], nor the

discretion to exercise it as need may require, *can be bargained away by the State.*" Beer Co. vs. Massachusetts, 97 U. S. 25; Boyd vs. Alabama, 94 U. S., 645.

"But the proposition rests upon the mere assumption that the law of Missouri was not enacted in the exercise of the police power of that State. CERTAINLY THE REGULATION OF THE SALE OF LIQUOR IS ESSENTIALLY A POLICE POWER. SURELY, ALSO, PROVISION MADE IN A STATE LAW TENDING TO DETERMINE THE PURITY OF MALT LIQUORS OFFERED FOR SALE AND CONSUMPTION WITHIN A STATE, IS LIKEWISE AN EXERTION OF THE SAME POWER.

"Conceding that the law in question may be inadequate to accomplish the purpose designed, and produces a large revenue to the State over and above the cost of inspection, this affords no Federal ground upon which to hold that the police power of the State was not brought into play in making the enactment where the law does not operate upon a subject within Federal control. This becomes evident when it is borne in mind that, whether the statute be regarded as a prohibition, as a regulation, as a license, or as an inspection law, if it encroached upon the federal authority it would be void, and on the contrary, in all or any of these aspects, the law would be valid, so far as the Federal Constitution is concerned, if it does not so encroach. The purpose of the Wilson Act is to make liquor, after its arrival, a domestic product, and to confer power upon the States to deal with it accordingly. The police power is, hence, to be measured by the right of the State to control or regulate domestic products —a State, and not a Federal question,—as respects the commerce clause of the Constitution.

* * * * * * *

"To decide that an exertion by a State of its power to regulate the sale of malt liquors manufactured within the State, was an exercise of its police authoriety, and yet to say that the same, when applied to liquor shipped into the State from other States, after delivery, was not an exertion of police power, would be to destroy the Wilson Act and frustrate the very object which it was intended to accomplish; and besides, would overrule the decision of this Court up-

holding and enforcing that statute.

"We need not, however, further consider the subject, *since the relief relied on is not open for discussion*, as a similar contention was expressly ruled upon in Vance vs. Vandercook Co., 170 U. S. 438, 42 L. ed. 1100, 18 Sup. Ct. Rep. 674.

* * "The confusion of thought which is involved in the proposition to which we have just referred, is embodied in the principle upon which the Court below mainly rested its conclusion. That is, 'if all alcoholic liquors, by whomsoever held, are declared contraband, they cease to belong to commerce, and are within the jurisdiction of the police power; but so long as their manufacture, purchase, or sale, and their use as a beverage in any form, or by any person, are recognized, they belong to commerce, and are without the domain of the police power.' But this restricts the police power to the mere right to forbid, and denies any and all authority to regulate or restrict. The manifest purpose of the act had been to allow the State law to govern the sale of the original package only where the sales of all liquor were forbidden, this object could have found ready expression, whilst, on the contrary, the entire context of the act manifests the purpose of Congress to give to the respective States full legislative authority, both for the purpose of prohibition, as well as for that of regulation and restriction with reference to the sale in original packages of intoxicating liquors brought in from other States."

Pabst Brewing Co. Appt. vs. Crenshaw et al. 25, S. C. R., 552.

In another recent case, this Court lays down the law upon this question as follows: "These decisions rest, it has been said, upon the acknowledged power of the State "to protect the health, morals and safety of the people by regulations that do not interfere with the execution of the powers of the general government." State vs. Brennan, 2 S. Dak. 390. See also Searls vs. Com., 83 Ky., 327; State vs. Gurney, 37 Me., 156. It has also been said, by the Supreme Court of the United States, in considering the power of the State to control traffic in intoxicating liquors: "Whatever difference of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health and prosperity of the citizens, and to the preservation of good order and the public morals. The legislature cannot, by any contract, divest itself of the power to pro-

vide for these objects. They belong emphatically to that class of objects which demand the application of the maxim, salus populi suprema lex; and they are to be attained and provided for by such appropriate means as the legislative discretion may devise. That discretion can no more be bargained away than the power itself." Boston Beer Co. vs. Massachusetts, 97 U. S. 33. To the same effect are License Cases, 5 How. (U. S.) 504; Mugler vs. Kansas 123 U. S. 625; People vs. Griesbach, 211 Ill. 39."

Here and now I desire to congratulate this Court upon its wise holdings on all these questions; and I wish to do this on behalf of my State and the people generally.

But whilst this Court has thus always held the correct doctrine, yet they have not always agreed upon the reasons for so holding; and from this cause, in my humble opinion, has arisen the most of the confusion of thought among the different members of this Honorable Court.

Whilst this Court, in my judgment, has always reached the right conclusion, yet, in my judgment, the Justices of this Court have not always assigned the true and rightful reasons for such conclusions.

Permit me to say that, in my judgment, this confusion of ideas is sometimes caused by an improper understanding of the respective powers of the Federal and State Governments.

The true reason which should be assigned in support of all these decisions may be stated as follows, to wit;

That the police powers of the State originally and always belonged to the States, was never surrendered by the States to Congress, and hence that Congress has, and never had any right to legislate on any subject whatever, which legitimately and properly came within the police powers of the States.

Mr. Chief Justice Fuller, *ante*, lays down the correct doctrine as follows: "The power of the States to impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order and prosperity, *is a power originally and always belonging to the States, not surrendered by them to the general Government, nor directly restrained by the Constitution of the United States,* AND IS ES-

SENTIALLY EXCLUSIVE."

Mr. Justices Harland, Brown and Gray in delivering their opinion in Rhodes vs. Iowa, *ante,* lay down the correct doctrine in the following language: "The regulation of the manufacture, sale and use of intoxicating liquors has always been recognized as the subject **peculiarly appertaining to the police power of the several States respectively.**"

Mr. Cooley in Const. Lim., 707, 708, lays down the correct doctrine as follows;

In the American Constitutional System, the power to establish the ordinary regulations of police has been left with the original States, and it cannot be taken from them, **either wholly or in part and exercised under legislation of the Congress.** Neither can the national government, through any of its departments or offices, assume any supervision of the police regulations of the States. All that the Federal authority can do, is to see that the States do not, under cover of this power, invade the sphere of national sovereignty," etc.

The Supreme Court of the Territory of Dakota, in Territory vs. O'Connor 5 Dak. 415, lays down the correct doctrine as follows: "It would seem to be conceded that the Legislature has power to authorize or allow municipal government by charter to exercise all the ordinary police powers, including the regulation and prohibition of the sale of intoxicating liquors."

Mr. Justice Fuller in rendering his concurring opinion in this very case (104 N. W.) 542 lays down the correct doctrine as follows: "As self-preservation is a law of nature predominant in every organized community, the inherent right to guard against the introduction and traffic in commodities which endanger the health and corrupt the morals of our citizens was **never surrendered to the general government.**"

In addition to these authorities, we have conclusively shown from the history of the formation of the Federal Constitution and articles of Confederation, that the States in forming the Federal Constitution, never intended to dele-

gate the congress any authority whatever over the police affairs of the several States or any thereof. We have also shown that the great State of New York, at the time of ratifying the Federal Constitution, reserved to itself the right to withdraw from the Union, provided this police power and other powers were not reserved to the States.

From all of which, we think it has been conclusively shown that Congress has, and never had, any right whatever to legislate upon the legitimate police affairs of any of the several States. If this important position be true, then it follows, beyond successful contradiction, that in the passage of the Inter-State Commerce Act, Congress had no authority whatever to interfere in any manner with the legitimate police affairs of the States. And it further follows that the Wilson Act, recited, confers no power whatever upon the States over legitimate affairs; for Congress had no power to do so. All the Wilson Act could do in the premises, was to recognize that the power in question was inherent in the several States, and that Congress, in the passage of the Inter-State Commerce Act, never intended to interfere with the traffic in intoxicating liquors in the several States of the Union in any manner whatever.

Bear in mind always, that this constitutes the true reason upon which is founded all the decisions of this Honorable Court upon the traffic in intoxicating liquors within the several States. Bear in mind always that these decisions, should not be founded upon the Wilson Act, but upon the true and broad ground that Congress never had any authority whatever to legislate upon this matter.

Bear in mind always, that we do not insist that the States can arrogate to themselves the right finally to decide what comes within their police powers; for this might jeopardize our whole system of government. Bear in mind that we always concede it belongs legitimately for this Honorable Court to determine the true lines where the police power of the States begins, and likewise where it ends. But when this Honorable Court has once established the line of de-

markation, Congress itself must be absolutely governed and controlled thereby to the same extent as the States. This honorable Court can rightfully say to each: "Thus far shalt thou go; but no farther."

This Court happily defined the line of the police power of the States with reference to intoxicating liquors. It has done this from the beginning. It has done this in the License Cases heretofore reproduced. It has done likewise in Wilkerson vs. Rahrer, already quoted at some length. And it has also done likewise in Pabst Brewing Co. vs. Crenshaw, already quoted.

We insist that this constitutes a final determination of this important question; and we have full faith that the pathway blazed through the forest for more than a century of time, will not be abandoned now.

In addition to the foregoing decisions of this honorable Court upon this important point, I will cite a few only of the numerous decisions of our State Courts of last resort which hold to the same doctrine and support the same position which this Court has always taken upon this subject.

First among the decisions of the various State Courts of last resort, I will here reproduce a sufficient portion of the opinions of the concurring Justices of the Supreme Court of the State of South Dakota, whereby they affirmed the conviction of the plaintiff in error in this very case. In delivering his opinion in this cause, Mr. Chief Justice Corson says:

"I fully concur in the views expressed by Mr. Justice Haney as to the constitutionality of the License law of this State. * * * In my judgment, when the conclusion was reached that the law is constitutional, it logically followed that the judgment of the Court below is correct and should be affirmed, as the defendant was clearly doing business in violation of the law of this State without having first paid the license required by the law. Section 2834, Rev. Pol. Code, relating to the sale of intoxicating liquors, provides: 'In all townships, precincts, towns and cities of the State, there shall be annually paid the following license, * * upon the business of selling or offering for sale any spirituous, vinous, malt, brewed or fermented or other intoxicating liquors at retail, * * * 400.00 per annum; upon the

business of selling or offering for sale any of the above mentioned liquors at retail by any traveling salesman who solicits orders by the jug or bottle in lots of less than five gallons, $200.00 per annum.' Section 2836 provides: 'Every person engaged or intending to engage in any business mentioned in section 2834, and requiring the payment of any license mentioned in said section shall * * * pay to the the County Treasurer in advance the license required by section 2834 for such business for a year commencing on the first day of July and ending on the 30th day of June next thereafter.' Section 2838 provides 'If any person or persons shall engage or be engaged in any business reqniring the payment of a license under section 2834 without having paid in full the license required by this article, * * * shall be punished by a fine of not less than $50.00 nor more than $500.00, and cost of prosecution, or by imprisonment in the county jail not less than ten days nor more than thirty days, or by both such fine and imprisonment in the discretion of the Court.'

"It will be observed by the statement of facts in this case that the defendant was a traveling salesman employed by Louis L. Metzger & Co., and that on the 10th day of February, 1904, he was engaged as traveling salesman in soliciting orders for said company for the sale of intoxicating liquors in quantities less than five gallons from citizens and residents of and within the County of Potter, and that he had not paid any license nor procured a permit to sell the same as required by the provisions of section 2834. * * It appears from the statement of facts that the defendant was doing precisely what he was prohibited from doing without paying a license and obtaining a permit therefor.

"Great stress is placed upon the fact that the firm for which the defendant (plaintiff in error) was soliciting orders was required to pass upon the orders and, if accepted, the intoxicating liquors were delivered through a transportation company in St. Paul; and that that constituted a delivery to the parties who had given the orders outside of the State; and that, for this reason, the defendant had not violated any of the provisions of the law, of this State. This construction of the law it seems to me, is entirely unwarranted by the language of its provisions, the evident intention of the law making power, and in conflict with decisions of the Court passing upon similar questions.

"When, as it appears by the statement of facts, the defendant was engaged in the business of offering for sale and soliciting orders for intoxicating liquors, without a payment of the license fee and obtaining a permit to engage in such

business, **he was engaged in the business prohibited by the law-making power.** In the view I take of the case, it is immaterial as to whether the transaction is to be regarded as a sale of liquor, or as offering it for sale, or soliciting orders for the purchase of the same, as the doing of either act constitutes a violation of the provision of the statute. Soliciting orders for the purchase of liquor, constituted a part of the transaction in the sale of the same; and this was the view taken by the Circuit Court of the United States for the district of New Hampshire, in Lang et al vs. Lynch, 38 Fed. Rep. 489, 4 L. R. A., 831, in which the Court held: 'Orders taken for the sale and delivery of liquors in violation of the law of the State, are a part of the contract of the sale, and as such render the entire transaction void, and no recovery thereon can be had.' The learned Circuit Judge in his opinion says: 'I am of the opinion, therefore, that the taking of the order by the agent of the plaintiff was a part of the contract of sale, so far as to forbid a right of recovery upon the contract, and that the statute of New Hampshire inflicting a penalty for the offence, prohibits the right of recovery, for the price of the liquor sold.' It is true this was an action to recover the value of the liquors sold and delivered in another State; but the Court seems to take the view,—and I think very properly,—that taking an order was a part of the sale.

In this case, it is not necessary to go so far as that Court went, as our statute provides a penalty for offering for sale or soliciting orders. In that case the learned Court held that the act of the State of Connecticut of 1882 forbid all persons without a license therefor to sell intoxicating liquors by sample, or by soliciting or procuring orders, and hold that a contract for sale made in the State of Connecticut by a traveling agent of a firm in another State of liquors to be delivered in such other State, is a violation of the statute. It appears in the statement of facts in that case, as in this, that a traveling salesman representing a firm in the city of New York was engaged in the State of Connecticut in soliciting orders for intoxicating liquors for his firm; and that such orders were transmitted to the firm in New York City and, if approved by the firm, the liquors ordered were delivered to a carrier in New York City for the party ordering the same. The Court in the case in its opinion says:

"'The defendant was convicted, and appealed to this Court. His grievance, that he was convicted of an unlawful sale, while, as he contends, he effected no sale within the meaning of the statute in this State. He said that he only solicited and obtained an order in this State, and that the

sale was completed by a delivery of the liquors by his employers to the purchaser in the State of New York. The statutes of 1882, c. 107, pt. 6, §1 (Acts 1882 p. 185), provides that 'any person who, without a license therefor, shall by sample, by soliciting or procuring orders, or otherwise, sell any spirituous liquors, shall be fined for the first offence not more than $50.00' etc. * * * 'The question is, what did the Legislature mean by selling by sample, or by soliciting or procuring orders? A majority of the Court think that it intended to prohibit just such a sale as was made in this case. If the statute is to be so construed as to limit its operation to sales completed by delivery in this State, of course a vast majority of sales by soliciting orders will not be embraced in the statute. We think that the legislature, taking notice of the fact that wholesale dealers in New York and elsewhere out of the State generally, sell their wares through agents going from place to place soliciting and procuring orders, intended to prohibit such sales; otherwise the facilities for making such sales are so great, extending to every town and hamlet in the State that the efficiency of the license law would be materially impaired. Dealers in neighboring States without license and without restrictions, could sell and cause to be delivered in any and all parts of the States liquors to any extent. Hence the legislature was careful to guard against such a result by prohibiting, as it does in the 11th section, all sales without a license and all sales in a no-license town.' And the court in concluding its opinion, says: 'The claim that the legislature intended only such sales as should be consummated by a delivery in this State, cannot be allowed. It is a matter of common knowledge that sales effected by drummers are usually, if not always, consummated by delivery at the vendors place of business to a common carrier; and while such delivery, for all civil purposes completes the sale made by the drummer, vests the title in the purchaser, and gives the seller a right to the purchase money, yet for all police purposes it is competent for the legislature to say that the acts done by the drummers shall of themselves constitute a sale, and therefore an offense. And we think the Legislature intended so to say, and to make all such acts an offense, whether the delivery was in or out of the State. By doing so the word 'sell' is used in the same sense in which it is generally used by business men in relation to this sub-

ject-matter. In common language, a drummer sells goods. He sells by sample. He sells by soliciting and procuring orders. The dealers sell by drummers as their agents. Now, if the statute does not reach all such cases, then it falls short of reaching the evil aimed at and **the intended remedy is a failure.'**

"That Court, in its opinion, evidently disregarded the claim made by the defendant that the order is taken by him were required to be passed upon and accepted by the firm in New York City before a sale could be made, and the claim that the Inter-State Commerce Law was violated, as unworthy of notice, as it does not refer to them in the majority opinion.

"It will be observed that the provisions of this section in this State are broader and more comprehensive than the provision of the statute of Connecticut, and as they include not only the **sale** of intoxicating liquors, but the **offering for sale and the solciting of orders.**

"Clearly, the defendant in the case at bar (the plaintiff in error in this Court) was engaged in the business in Potter County, not only of selling, but offering for sale, and soliciting orders for the sale of intoxicating liquors. The claim that the defendant had not committed the offense under the statute, because the order had to be approved at St. Paul, and that the delivery was made there to the purchaser, and not in South Dakota, is clearly untenable. Such a construction is entirely unwarranted by the law itself or by the evident intention of the law-making power. In my judgment, it is entirely immaterial whether the liquors were delivered in this State, or delivered at all. The offense was complete under the statute, when the defendant **solicited** the order, or **offered** the liquor for sale.

* * * "The Legislature not only prohibited the **sale** of intoxicating liquors, but the **offering** for sale, or the **soliciting** of orders for the purchase of, the same by any person, unless he had paid such license and procured the permit. We may assume that the Legislature knew all or nearly all traveling salesmen take orders subject to the approval of the houses represented by them, and that the delivery of the goods sold is usually made in other States. If our Legislature simply meant to prohibit the offering for sale or soliciting of orders in cases where the goods were actually delivered by the agent in this State, it failed to

accomplish anything beneficial by the enactment of the law, as, of course, it was known to them, and it is known to us, that few, if any, such sales would be made by agents in this State, but there would be, as in the case at bar, the form of submitting the order to the firm outside of the State, and that such firm would accept the order and deliver the liquor outside of our State.

"I understand that the power of the Legislature to require the payment of such license before engaging in the business in this State of soliciting orders or offering for sale intoxicating liquors, will be affirmed by the undivided Court in holding the law constitutional.

"In my opinion, the judgment of the Court below should be affirmed."

In delivering his opinion in the case at bar. when before the Supreme Court of the State of South Dakota, Mr. Justice Fuller says:

"As self-preservation is a law of nature. predominant in every organized community, the inherent right to guard against the introduction and traffic in commodities which endanger the health and corrupt the morals of our citizens, was never surrendered to the general government; and the statute confessedly violated by the accused, in no manner interferes with any of the laws of the United States. From the opinion of Chief Justice Taney in the License Cases, 5 How. 504, 12 L. ed. 256, I quote as follows: 'These laws may, indeed, discourage imports and diminish the price which ardent spirits would otherwise bring. But although a State is bound to receive and permit a sale by the importer of any article of merchandise which Congress authorizes to be imported, it is not bound to furnish a market for it, nor abstain from the passage of any law which it may deem necessary or advisable to guard the health or morals of the citizens, although such law may discourage importation, or diminish the profits of the importer, or lessen the revenue of the general government. And if any State deems the retail and internal traffic in ardent spirits injurious to its citizens, and calculates to produce idleness, vice, or debauchery, I see nothing in the constitution of the United States to prevent it from regulating and restraining the traffic, or from prohibiting it altogether, if it thinks proper.'

"Assuming that our police system of regulating the liquor traffic by means of high license, has a tendency to diminish Inter-State shipments, that result would constitute no infringement of the constitutional guarantee of commercial freedom among the States. Independently of any ques-

tion of citizenship, and without the slightest discrimination, the solicitor of orders, as a person engaged in the business of offering intoxicating liquors for sale must pay the license, or suffer the penalty provided by the statute; but no penalty, restriction or burden, is imposed upon a non-resident engaged in Inter-State Commerce.

"And to the validity of the law under consideration, I concur with both my associates, and with Presiding Judge Corson, agree in the conclusion that the plaintiff in error was lawfully convicted, consequently the determination of all questions of law and fact at the trial below is sustained by the majority of this Court, and the judgment of conviction is therefore affirmed."

State vs. Delamater, (S. D.) 104 N. W. 537, et seq.

Bear in mind that the foregoing constitutes the decision of the Supreme Court of the State of South Dakota in this cause, wherein that Court affirmed the conviction of the plaintiff in error in the trial Court. This is certainly conclusive evidence of the constitutionality of the statute under which the plaintiff in error was convicted, so far as the constitution of the State of South Dakota is concerned. This same question, that the said statute of South Dakota was in violation of section 8 of article 1 of the Federal Constitution, was raised and urged and insisted upon in that Court: but as we have just seen, that Court upheld the statute in question and declared that it conflicts in no manner whatever with the commerce clause of the Federal Constitution.

The Supreme Court of Alabama, in their opinion filed February 7, 1905, lays down the true doctrine, in part, in the following words:

"It belongs to the legislative department, in the exercise of the **police power** of the State, to determine primarily what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety, subject to the power of the Courts to adjudge whether any particular law is an invasion of the right secured by the constitution. We think it is well settled that the legislature, in dealing with the sale of intoxicating liquors, is fulfilling a public duty; that it is striving to promote the health, safety and morals of the community."

Equitable L. & S. Co. vs. Town of Edwardsville (Ala.) 38 S. W. R., 1016.

In a recent case, the Supreme Court of the State of

Indiana made use, in part, of the following language:

"The power to regulate the liquor traffic is found in the **police power** of the State; and it should be remembered, in considering all statutes on this subject, that no one possesses an inalianable or constitutional right to keep a saloon for the sale of intoxicating liquors. 'To sell intoxicating liquors at retail is not a natural right to pursue an ordinary calling.'—Black, Intox. Liq., §48; Boomershine vs. Uline (1902) 159 Ind., 500, 503; State vs. Venhardt (1896) 145 Ind., 439, 462, 33 L. R. A., 313; Sherlock vs. Stuart (1893) 96 Mich., 193, 55 N. W. Rep. 845, 21 L. R. A., 580; Cooley Const. Lim. (7 ed) 845, 851.

"Neither is the right to sell intoxicating liquors one of the privileges and immunities of citizens of the United States which the 14th amendment of the constitution of the United States forbids the States to abridge.—Bartmeyer vs. Iowa (1873) 18 Wall (U. S.) 129, 21 U. S., (L. ed) 929; Mugler vs. Kansas (1887) 123 U. S., 623, 8 U. S. Sup. Ct. Rep. 273; Crowley vs. Christensen (1890) 137 U. S. 86; Giozza vs. Tiernan (1893) 148 U. S., 657; Farmville vs. Walker (1903) 101 Va., 323, 43 S. E., 588; Danville vs. Hatcher (1903) 101 Va., 523, 526, 531; Cooley, Const. Lim., (7 ed.) 854–851.

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"The privileges and immunities of the citizens of the United States, are privileges and immunities arising out of the nature and essential character of the national government, and granted or secured by the constitution of the United States; and the right to sell intoxicating liquors is not one of the rights growing out of the said citizenship. Bartemeyer vs. Iowa (1873) 18 Wall., (U. S., 129.

"The fourteenth amendment does not take from the States their powers of police that were **reserved at the time the original constitution was adopted.** Undoubtedly it forbids any arbitrary deprivation of life, liberty or property, and secures equal protection to all under like circumstances in the enjoyment of their rights; but it was not designed to interfere with the power of the States to pro-

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"These principles have been sustained by the Supreme Court of the United States in a long line of decisions, rendered both before and after the adoption of the 14th amendment.—Bartemeyer vs. Iowa (1873) 18 Wall. (U. S) 129; Boston Beer Co. vs. Massachusetts (1877) 97 U. S. 25; Mugler, vs. Kansas, (1887) 123 U. S., 623; Kidd vs. Pearson, (1888) 128 U. S., 1; McGaney vs. Virginia (1890) 135 U. S., 662; Crowley vs. Christensen, (1890) 137 U. S., 86; Giozza vs Tiernan (1893) 148 U. S., 637."

In a very recent case the Supreme Court of the State of Tennessee, relative to the point under consideration, through Mr. Chief Justice Beard, lays down the doctrine as follows:

"With regard to the retailing of intoxicants, there has never been a question as to the rights of the several States to control the subject. The long line of cases found in the reports of the Supreme Court of the United States agree in affirming the general proposition that the regulation of the manufacture and the sale of intoxicating liquors is peculiarly under the control of the States, and within their **police power which has not been surrendered to the Government.**—License Cases, 5th How. (U. S.) 504; Bartemeyer vs. Iowa 18 Wall., (U. S.) 129; Boston Beer Co. vs. Massachusetts 97 (U. S.,) 25; Foster vs. Kansas 112 (U. S.,) 201; Mugler vs. Kansas, 123 (U. S.) 623; Kidd

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"The police power possessed by the States to pass those regulations necessary to preserve the health, morality, order and peace among their citizens, if not as easily defined, is as absolute as the right of the national government to regulate commerce with foreign nations or among the several States. The laws passed in the exercise of this power, should receive such an interpretation, notwithstanding the generality of the terms in which they may be expressed, as will confine them in their application to those subjects with which they may lawfully deal."

We have thus endeavored to show.—and we think, successfully,—that the holding of this Honorable Court are abundantly sustained by the Courts of last resort throughout the States; and that, while Justices of this Honorable Court have not always concurred in perfect harmony with the **reasons** for their holdings, yet they have always agreed in the ultimate result. And if this Honorable Court adheres to its holdings throughout the long period of nearly a century of time, we shall expect that, in the case at bar, the decision of the Supreme Court of the State of South Dakota in the case will be sustained and upheld.

THE SOUTH DAKOTA STATUTE.

"AN ACT to provide for the Licensing, Restriction and Regulation of the Business of the Manufacture and Sale of Spirituous and Intoxicating Liquors."—Session Laws, South

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"§2834.—In all townships, precincts, towns and citi
of this State there shall be annually paid the followi
license upon the business of selling or keeping for sale
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orders by the jug or bottle in lots of less than five gallon
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§2838.—"If any person or persons shall engage or
engaged in any business requiring the payment of licen
under section 2834, without having paid in full the licen
required by the article, * * * or shall in any mann
violate any of the provisions of this article, such person
persons shall be deemed guilty of a misdemeanor, and up
conviction thereof, if there is no specified penalty provid
therefor by this article, shall be punished by a fine of
less than Fifty Dollars nor more than Five Hundred Dolla
and costs of prosecution, or by imprisonment in the coun
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§2838.—"If any person or persons shall engage or be engaged in any business requiring the payment of license under section 2834, without having paid in full the license required by the article, * * * or shall in any manner violate any of the provisions of this article, such person or persons shall be deemed guilty of a misdemeanor, and upon conviction thereof, if there is no specified penalty provided therefor by this article, shall be punished by a fine of not less than Fifty Dollars nor more than Five Hundred Dollars, and costs of prosecution, or by imprisonment in the county jail not less than ten days nor more than thirty days or by both such fine and imprisonment, in the discretion of the Court."

§2834–2838, Revised Political Code, South Dakota, 1903.

The plaintiff in error was arrested, tried, convicted and sentenced for a violation of these sections of our statute, which was enacted in full persuance of the rightful power of the Legislature of this State to control its own police affairs in its own way, so as best to promote the welfare, prosperity, safety and morals of our people. That the Legislature of this State possesses full power thus to regulate its own proper police affairs, has been shown conclusively by the authorities quoted and cited.

Bear in mind that this Statute makes no discrimination whatever between its own citizens and citizens of other

States. It treats everybody precisely alike. The citizens of South Dakota are restrained in precisely the same way as the citizens of Minnesota. The dealers in intoxicating liquors in South Dakota are treated precisely like the dealers in the State of Minnesota. The dealers in St. Paul in the State of Minnesota, and the dealers in Sioux Falls, in the State of South Dakota, are treated precisely alike. There is no hint of any favoritism in favor of the citizens of South Dakota or any other State in the Union.

For the purpose of informing this Court more fully in regard to the holdings of the Supreme Court of the Territory of Dakota and the State of South Dakota upon the traffic in intoxicating liquors, I quote from the opinion of Mr. Chief Justice Tripp, (late President of the Samoan Commission), whose opinions are excelled by none, wherein he says:

"The Plaintiff in this proceeding seeks to attack the validity of Chap. 70 of the laws of the Legislative Assembly, passed at the 17th Session, 1887, entitled 'An Act to prohibit the Sale of Intoxicating Liquors by local option. * *

"Police powers are among the more common powers exercised by the sovereign States."

"This police power of the State extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the State. According to the maxim **'sic utero tuo ut alienum non leidas,'** which being of universal application, it must, of course, be within the range of legislative action to define the mode and manner in which everyone may so use his own as not to injure others. * * * There is also the general police power of the State by which persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health and prosperity of the State; of the perfect right in the Legislature to do which, no question ever was, or, upon acknowledged general principles, ever can be made, so far as natural persons are concerned." Thorpe vs. Railway Co., 27 Vt. 149. The power to prohibit the sale of intoxicating liquors not only comes within these definitions, but it has been frequently so held by the Courts. Mr. Cooley says: 'In the American constitutional system the power to establish the ordinary regulations of police **has been left with the individ-**

ual States, and it cannot be taken from them, either wholly or in part, and exercised under legislation or Congress. Neither can the national government, through any of its departments or officers, assume any supervision of the police regulations of the States. All that the federal authority can do is to see that the States do not, under cover of this power, invade the sphere of national sovereignty, obstruct or impede the exercise of any authority which the constitution has confided to the nation, or deprive any citizen of rights guaranteed by the Federal Constitution; Cooley Const. Lim. 708, 709. The very theory upon which our system of government is based, of allowing each locality to govern its municipal affairs in its own way, and that the Congress shall legislate upon affairs pertaining to the good of the whole people, made it necessary that the people of the territories should have a local government; and its matters of police were among the first and necessary powers committed to such local government.

If, then, the power of local option pertains to the police, it is a rightful subject of legislation, and the power to make such law was given by the Organic Act: but, irrespective of such logical conclusion, to which we must arrive, it would be a bold and backward step for the Court to say, in the face of modern legislation upheld by the highest courts of the States and the Nation, that local option is not a 'rightful subject of legislation.'" * *

Territory vs. O'Connor, (1889) 5 Dak. 397.

Bear in mind that the foregoing decision was rendered more than two years after the approval of the Inter-State Commerce Act, and with a full knowledge of the provisions thereof by Mr. Chief Justice Tripp, who wrote the foregoing opinion. And I will call the attention of this Court to the undoubted fact that the legal lore embraced in the foregoing opinion, more than anything beside, led to the appointment of Mr. Tripp at the head of the Samoan Commission.

More than two years subsequent to the date of the foregoing decision, (the Territory of Dakota, in the interim, having been divided and admitted into the Union as two States) the Supreme Court of the State of South Dakota makes use of the following language:

"Legislation similar to ours now under consideration

has also been repeatedly held by the Supreme Court of the United States to be unobjectionable to the fourteenth amendment to the Constitution of the United States. In the case of Bartemeyer vs. Iowa, 18 Wall. 129' it was said that prior to the adoption of the fourteenth amendment, State enactments regulating liquors raised no question under the Constitution of the United States; and that such legislation was left to the discretion of the respective States, subject to no other limitations than those imposed by their own constitutions, or by the general principles supposed to limit all legislative power. Referring to the contention that the right to sell intoxicating liquors was secured by the fourteenth amendment, the Court said: 'So far as such right exists, it is not one of the rights growing out of citizenship of the United States.' In Beer Co. vs. Massachusetts, 97 U .S. 55, the Court says: 'As a measure of police regulations, looking to the preservation of public morals, a State law prohibiting the manufacture and sale of intoxicating liquors is not repugnant to any clause of the Constitution of the United States.' In Foster vs. Kansas, 113 U. S.. 201-206, 5 Sup. Cy. Rep. 8, 68, the Court said that the question as to the constitutional power of a State to prohibit the manufacture and sale of intoxicating liquors was no longer an open one in that Court (Supreme Court of the United States). These cases rest upon the acknowledged right of the States of the Union to control their purely internal affairs, and in so doing to protect the health, morals and safety of their people by regulations that do not interfere with the execution of the powers of the general government."

State vs. Brennan, (1899) 2 S. D., 384.

State vs. Beucklen, 10 S. D., 156.

Bear in mind that the foregoing decision was rendered more than four years subsequent to the approval of the Inter-State Commerce Act.

THE ASSIGNMENTS OF ERROR.

The six Assignments of Error, on behalf of the plaintiff in error, have not been taken up and discussed separately, for the reason that there is practically but one question raised by them all.

It was conceded by the plaintiff in error in the trial Court in substance that the plaintiff was guilty of the offense charged in the information, provided only that the statute

in question was not in violation of §8 of article 1 of the Federal Constitution.

Hence, there being but one question at issue, it has been thought unnecessary to take up each assignment of error separately; but that it were better to discuss the single question presented by all the assignments of error.

Strangely enough, under rule 21 of this Court, the parties to actions are not required to serve their Brief on opposing counsel, and are required to file them with the Clerk of this Court only six days before the case is to be called for argument; hence the Defendant in Error in this cause is without any information whatever relative to the authoritiy cited and relied upon by the plaintiff in error, in this Court, at the time of the preparation of this Brief.

Just why such an unreasonable rule, relative to the service of Briefs, should prevail in this Court, is entirely beyond my comprehension. But inasmuch as it *is* the rule, it must be presumed to be founded upon some reason; and attorneys must govern themselves accordingly as best they can.

It may thus be seen that, by reason of having no knowledge of the authorities cited and relied upon in this cause in this Court by the plaintiff in error, the defendant in error is thereby limited to an examination of the authorities cited and relied upon in the trial Court, and in the Supreme Court of the State of South Dakota in support of his assignments of error; and hence we will now proceed to a brief examination thereof.

On page 7 of the Brief for Plaintiff in Error, used on the hearing of this cause in the Supreme Court of South Dakota, —now on file in this Court,—Counsel for plaintiff in error says:

"The leading case, and one that has been followed by hundreds of subsequent cases, is the case of Robins vs. Shelby County Taxing District, where the Court says: 'Inter-State Commerce cannot be taxed at all, even though the same amount of tax should be levied on domestic commerce or that which is carried on solely within the State.'—Robins vs. Shelby Taxing District, 120 U. S., 489."

In reply to this, all I wish to say is, nobody claims, that Inter-State Commerce can be taxed by a State. The pen-

alty provided in the statute in question in the case at bar, does not pretend to impose a tax upon Inter-State Commerce. The Plaitinff in Error was not convicted in the trial Court for the violation of any statute imposing a tax upon the Inter-State Commerce. He was convicted of the crime of soliciting orders for the sale of intoxicating liquors at and within the County of Potter and State of South Dakota. He was carrying on this business in the County of Potter and State of South Dakota. He was arrested by the Sheriff of said County of Potter at and within the said County of Potter and State of South Dakota. So far as the evidence in this case shows, he was a citizen of the State of South Dakota.

The statute in question was passed,—not to regulate Inter-State Commerce,—but to regulate and control the police affairs of the State of South Dakota relative to intoxicating liquors. This statute, of course, is of no effect outside of the State of South Dakota. It was not intended to have any such effect. It imposed a penalty on whom? On those violating the statute at and within the State of South Dakota. It imposed no penalty whatever on Lewis L. Metzger & Co., of the City of St. Paul and the State of Minnesota. It did not purport to impose any such penalty. The statute was passed exclusively to control the citizens of the State of South Dakota in the transaction of the traffic in intoxicating liquors at and within the State, and likewise all others engaged in the same business at and within the State of South Dakota. It was entirely local in its operation. It has nothing whatever to do with Inter-State Commerce in any manner, shape or form.

Hence, while the case cited undoubtedly lays down the law correctly which was involved in that case, yet it has nothing whatever to do with the case at bar.

Immediately thereafter Counsel for Plaintiff in Error cite a portion of the opinion of the Honorable Chief Justice of this Court, in Lyng vs. the People, 135 U. S., 161, wherein it is said that no State has the right to lay a tax upon Inter-State Commerce. Just why the Counsel should deem it necessary to cite authorities upon this point, is cer-

tainly beyond ordinary comprehension; for no one claims that a State has any such right.

Counsel for plaintiff in error, on page 9 of said Brief, makes use of the following language:

"It would seem that this matter should be ruled and determined by the decision in State vs. Rankin, decided by this Court (Sup. Ct. S. D.) on August 31, 1898, the syllabus of which is as follows: 'The laws of 1887, page 102, imposing a license fee on solicitors taking orders for mercantile establishments violates the Inter-State Commerce clause of the Constitution of the United States as against the salesmen of a house of any other State selling *clothing* by sample to be made from measurements taken by the salesman, and this, although there is no discrimination between resident and nonresident establishments.'"

In reply to the foregoing, I wish to call the attention of this Court to the fact that the opinion in this South Dakota case just cited, was handed down by Mr. Justice Fuller, who wrote one of the concurring opinions in the case at bar when before that Court, wherein the plaintiff in error was held to have been properly convicted of the offense charged in the information in the case at bar.

We fully concur with that opinion. It lays down the sound doctrine beyond all question. Nobody disputes it. But bear in mind always that selling *clothing* is one thing, and selling *intoxicating liquors,* without restrictions of any kind, which corrupt the morals, destroy the health, and ruin the prosperity of untold thousands of families, is another matter entirely. And Mr. Justice Fuller, in delivering his opinions in the two cases referred to, undoubtedly understood and realized the broad distinction between the two cases. He states the difference between them in as strong terms as our language affords.

The Statute in question is a License Law and not a Tax or Revenue Law.

In reviewing the authorities presented by counsel for plaintiff in error in the Supreme Court of South Dakota, it becomes necessary to state that the statute in question is a License Law, and is neither a Tax or Revenue Law; and secondly, that if the law in question contains any of the

characteristics of a Tax Law, it is simply an occupation tax and not a tax upon the goods, and hence is in no sense a tax upon Inter-State Commerce. Thirdly, that without regard to whether it is a License Law, a Tax Law, or an occupation Tax, it is conclusively a *police regulation,* and as such, is wholly within the powers of the State. Fourthly, that if the States had no power, prior to August 8, 1890, to pass laws regulating traffic in intoxicating liquors, as a police regulation, the Act of Congress of August 8, 1890, known as the Wilson Act, gave the States that power, not only to regulate the sale of the goods after arrival within the State, but to pass such laws as might affect the preliminary steps of the sale, or the incidents of the sale as well as the consummated sale itself. Fifthly, there being no question that, under the police powers of the State, considered either as a reserve or a granted power by said Act, the State had and has power to pass laws either forbidding or regulating the sale of intoxicating liquors; and hence it necessarily has power to regulate the sale thereof. And if the State had the right to license the sale and prohibit the engaging in the business of selling without the payment of the license, the law would be of no value whatever, unless that power included the power to regulate the preliminary steps or incidents of such sale.

We respectfully contend that, if we show these propositions or any of them to be the correct law, then it becomes an established fact that the statute under which the plaintiff in error was convicted is clearly within the power of the State Legislature, and hence that the same is constitutional. The first proof of the nature of the Act and of its purposes is the title, which we have hereinbefore reproduced. A consideration of the entire Act, plainly shows it is nothing more nor less than a License upon the business, divided into different parts into which such traffic is usually carried on, viz: Wholesale, retail, and selling by soliciting orders; purely a license law in its parts. From the very nature of the Act, it is plainly to be seen it was not intended for the purpose of producing revenue for the State, but on the contrary, it shows nothing but an intent to regulate, control and restrict a business deemed by the constitution and the Legislature,

of the State of South Dakota as inimical to the best interest, welfare, health and morals of the people.

Such laws are almost universally held to be license laws, and not tax laws, regardless of the amount of revenue derived therefrom. Upon this proposition, as to the nature of the Act in question, we submit the following:

"According to the great weight of authority, the power inherent in the Legislature to regulate the exercise of privileges and of following pursuits and occupations, does not fall properly within the Taxing powers, but within its police power. License fees exacted by the general laws regulating the traffic in intoxicating liquors, are not taxes within the meaning of any constitutional provision relating to taxation, but are nothing more nor less than the price paid for the privilege of doing a thing, the doing of which, the legislature has a right to prohibit altogether. These laws are regarded as *police regulations* enacted with a view of regulating and restricting a business regarded as evil in its effects upon society. It does not follow that because the license is large, or because it may become a part of the public revenue, it is therefore a tax."

This position is abundantly sustained by the following authorities:

17th Ency. of Law, 2d ed. 223, citing.
Straub vs. Gordon, 27 Ark., 625.
Ex parte Marshall, 64 Ala., 267.
Territory vs. Connell, (Ariz.) 16 Pac., 209.
Henry vs. State, 26 Ark., 523.
State vs. Doherty, 2 Idaho, 1105.
E. St. Louis vs. Vehrung, 46 Ill., 392.
U. S. Distilling Co. vs. Chicago, 112 Ill., 19.
Thomasson vs. State, 15 Ind., 449.
Com. vs. Fowler, 96 Ky., 166.
Keller vs. State, 11 Md., 525.
Youngblood vs. Sexton, 32 Mich., 406.
State vs. Klein, 22 Minn., 328.
State vs. Hudson, 78 Mo., 302.
Pleuler vs. State, 11 Neb,, 569.
People vs. Murray, 4 N. Y., App. Div., 185.
Senior vs. Ratterman, 44 Ohio St., 661.
Anderson vs. Brewster, 44 Ohio St., 576.
Adler vs. Whitbeck, 44 Ohio St., 539.

State vs. Hipp, 38 Ohio St., 225.

"Licenses imposed on the Liquor traffic and other occupations which call for regulations by the State, do not cease to be licenses proper, even though they yield a revenue in access of that required for the purpose of the regulation."

Encyc. L. 2nd ed., 774;

City of Indianapolis vs. Bieler, 36 N. E., 857;
East St. Louis vs. School Trustees, 102 Ill., 489.

"Occupation taxes, are not property taxes, and therefore are not subject to the restrictions imposed upon property taxation."

United States:

Savings Soc. vs' Coite, 6 Wall. (U. S.) 594;
Hamilton Mfg. Co. vs. Massachusetts, 6 Wall. (U. S.) 632;
Provident Inst. vs. Massachusetts, 6 Wall. (U. S.) 611;
Pullman Southern Car Co. vs. Nolan, 22 Fed. Rep., 278.

Alabama:

Goldsmith vs. Huntsville, 120 Ala., 182;
Capital City Water Co. vs. Montgomery County, 117 Ala., 303.

Georgia:

Burch vs. Savannah, 42 Ga., 596;
Rome vs. McWilliams. 52 Ga., 251;
Decker vs. McGowan, 59 Ga., 805;
Johnston vs. Macon, 62 Ga., 645;
Mutual Reserve Fund L. Assoc. vs. Augusta, 109 Ga., 73.

Iowa:

Scottish Union, etc., Ins. Co. vs. Herriott, 109 Iowa 606, 77 Am. St. Rep. 548.

Kansas:

In re Martin, 62 Kan., 638.

Kentucky:

Louisville City R. Co. vs. Louisville, 4 Bush (Ky.) 478.

Louisiana:

Blanks vs. Bastrop, 18 La. Ann., 534;
New Orleans vs. Louisiana Sav. Bank, etc., Co., 31 La. Ann., 637;
Wintz vs. Girardey, 31 La. Ann., 381;
New Orleans vs. Metropolitan Loan Sav. etc., Bank, 31 La. Ann. 310;
Walters vs. Duke, 31 La. Ann., 668;
State vs. Citizens' Bank, 52 La. Ann., 1086;
Municipality No. Two vs. Dubois, 10 La. Ann., 56.

Maine:

State vs. Western Union Tel. Co. 73 Me., 518.

Massachusetts:

Com. vs. Lancaster Sav. Bank, 123 Mass., 493.

Mississippi:

Orton vs. Brown, 35 Miss., 426.

Montana:

State vs. Camp Sing, 18 Mont. 128, 56 Am. St. Rep., 551.

Nevada:

Ex. p. Cohn, 13 Nev., 424.

Ohio:

State vs. Adams Express Co., 3 Ohio Dec., 326;
Baker vs. Cincinnati, 11 Ohio St., 534.

South Carolina:

Florida Cent., etc., R. Co. vs. Columbia, 54 S. Car., 266.

Tennessee:

Howe Mach. Co. vs. Cage, 9 Baxt. (Tenn.) 518;
State vs. Crawford, 2 Head (Tenn.) 460;
Taylor vs. Vincent, 12 Lea. (Tenn.) 282, 47 A. M.

Rep., 338;
Knoxville, etc., R Co. vs. Harris, 99 (Tenn.) 684.

Texas:

Ex p. Gregory, 1 Tex. App. 753;
Thompson vs. State, 17 Tex. App. 253;
Texas Banking etc., Co. v. State, 42 Tex. 636.

As a paramount authority in South Dakota in favor of this proposition, we only deem it necessary to refer to the opinion of the Supreme Court of South Dakota in State vs. Buchler. The language used by Mr. Justice Fuller in his opinion, states most aptly, fairly and correctly, the modern ruling upon that question, a portion of which opinion is well worth producing here, as applying to this case, viz.:

"Pursuant to the will of a majority, aroused to consciousness of the fact that the retail liquor traffic is an expensive evil, resulting in irreparable injury to society, entailing upon the public the burden of increased pauperism and additional criminal prosecutions, often to no avail, the Legislature deemed the license system to be the most effective mode by which to restrict, regulate and control the business; and the law enacted (the statute involved in the case) unmistakably partakes of the nature of a *police regulation* designed to impose upon the dealer the burden of liquidating, so far as practicable, the damage thus occasioned. The primary object of the law, as specifically declared by the title, is to 'provide for the license fee, restricting the regulation of the business of the manufacture and sale of intoxicating liquor'; and the fact that the general revenue is incidentally increased, is not sufficient to invalidate the act, or subject the same to any constitutional objection. * * * The occupation being one which the lawmaking power had the right to prohibit entirely, or partially suppress by the issuance of a license under specified restrictions to persons only who possessed certain moral attributes, the money thus received *is in no constitutional sense a tax*, and the same may be rightly devoted to such public use as the legislature may direct, independently of the expense occasioned by the traffic, and without regard to any of the considerations which prompted the license enactment."

From the foregoing, it conclusively appears there can be no question that we are dealing with an enactment which is not a tax law, and which does not therefore directly attack Inter-State Commerce.

The License required is an Occupation License, and therefore a part of the Internal Machinery of the State, and is not subject to the Commerce Powers of Congress.

The law in question in case at bar required a license of any person who shall engage in "the business of selling or offering for sale any of the above mentioned liquors at retail by any traveling man who solicits orders," etc. The evidence in the cause establishes conclusively that the plaintiff in error did engage in this business; yet counsel for plaintiff in error, before the Supreme Court of South Dakota, cited case after case to show that statute imposing a direct tax upon Inter-State Commerce is void, and does so without discriminating between statutes which makes it an offense to solicit orders for intoxicating liquors, and others which prohibits the soliciting orders for intoxicating liquors, and others which prohibit the soliciting of orders, and which in no wise relate to the license business.

As a general principle, occupation licenses or taxes are constitutional, and the States have a right to provide for the same, unless by direct terms and direct action, they interfere with the Constitution of the United States.

"The right of a State to tax its own citizens for the transaction of any particular trade or profession within the State has not been doubted." "Now, the Federal Government can no more regulate the commerce of the State, than a State can regulate the commerce of the Federal Government. * * * The taxing power of a State is one of its attributes of sovereignty. And where there has been no compact with the Federal Government, or cession of jurisdiction for the purposes specified in the constitution, this power reaches all the property and business within the State, which are not properly denominated the means of the general Government; and as laid down by this Court, it may

be exercised at the discretion of the State. The only restraint is found in the responsibility of the members of the legislature to their constituants.

"If this power of taxation by a State, within its jurisdiction, may be restricted beyond the limitations stated, on the ground that the tax may have some indirect bearing on foreign commerce, the resources of the State may be thereby essentially impaired. But State power does not rest on a basis so undefinable. Whatever exists within its territorial limits in the form of property, real or personal, with the exceptions stated, is subject to its laws; and also the numberless enterprises in which its citizens may be engaged. **These are subjects of State regulation and State taxation; and there is no Federal power under the constitution which can impair this exercise of State sovereignty.**"

This is the language of Mr. Justice McLean, of this Court, delivered in

Nathan vs. The State of Louisiana, 8 How. 73, citing 8 Wall., 184; 12th Wall., 213, 224. 428; 7 Otto 569; 9 Otto, 279; 10 Otto, 95, 499; 4 Blatchf.. 267 16 Pat. Off. Gaz. 1000.

"The power of the legislature to impose license fees on the occupation of manufacturing and selling liquors, is undoubted; and it may also define what are liquors within the meaning of the law." 17th Cyc. L. 2nd ed., 222, and cases there cited.

And the States may license all tax occupations.

21 Cyc. L., 2nd ed., 776. and cases therein cited in note 7 from the following Courts:

United States, Supreme, Alabama, Arizona, California, Colorado, Connecticut, Florida, Illinois, Indiana, Kansas, Louisiana, Massachusetts, Michigan. Mississippi, Missouri, Nebraska, Nevada. New Jersey. New York, North Carolina, Ohio, Pennsylvania. South Carolina, Tennessee. Texas, Virginia and Wisconsin.

To which I add the following:

State vs. Delamater (this case) 104 N. W. (S. D.) 537;
State vs. Klectzon, 8 N. D. 286, 78 N. W., 984;
Elk Point vs. Vaughn. 5th Dak. 115, 46 N. W., 577;
Territory vs. Webster, 5th Dak. 351, 40 N. W. 535.

Control of intoxicating liquors is within the

police power of the State.

In discussing his assignments of error before the Supreme Court of South Dakota, counsel for plaintiff in error almost entirely disregarded one of the most important rights possessed by the States, and which of all others, is the right most in question in this case, and of paramount importance in considering the act of the legislature involved in this case. Counsel relies upon many cases in substantiation of a theory which is not disputed, and which does not in the slightest degree involve the question of the police powers of the State which are involved in this cause; and if the police powers of the States had not been referred to incidently, in one or two or three cases cited, it is apparent that this great principle underlying power would have been lost sight of entirely by the counsel for plaintiff in error.

Believing it necessary to a complete understanding of the rulings upon like questions, we desire to call additional attention to this great fundamental power possessed by the States, and show that in the exercise of this power, the State of South Dakota had and has a perfect right to regulate and control the traffic, sale, distribution and delivery of intoxicating liquors to its people.

Were it not for this power, the authorities cited by counsel for plaintiff in error might be deemed to settle this case in his favor; for it is undoubtedly true that, so far as usual and ordinary goods of commerce are concerned, the State cannot interfere; but when it comes to the point of determining what is best for the welfare, present and future, of the inhabitants of a commonwealth, then the legislature of the commonwealth itself becomes the judge or arbiter, and possesses the concluding power to say how such commerce shall be regulated and its goods distributed to the people.

No provision of the Federal Constitution ever gave Congress the power or the right of indiscriminately placing in the hands of the people of the several States dangerous and meretricious articles for use or consumption. But the power to deny such right,—if rights they can be called,—belongs to the people of the several States of the Union, and is superior in all respects to the commercial

rights of the people of other States.

"In order that social life may exist, that human facilities may be developed, and the progress of civilization be made possible, a certain minimum of physical well-being is necessary. This minimum varies in different periods, and rises with advancing civilization until it includes a certain standard of comfort. Closely connected with physical well-being, is a recognition of elementary moral standards, and a repression of at least the outward manifestations of vice and immorality, in so far as the maintenance of these physical and moral standards depend upon conditions affecting a considerable number of people alike, the government attempts to secure them to the public and to the individual. Criminal justice, the proprietary action of the State, and the police power, are equally enlisted for this purpose.

"The exercise of the police power for the protection, safety, order and morals, constitutes the police in the primary or narrow sense of the term, It is the police power, in this narrow sense of the term, which the Supreme Court of the United States concedes on principle to the States, even where its exercise affects Inter-States and foreign commerce."

From the very beginning of the consideration of the evils of the liquor traffic, we find the Courts holding that the regulation and control of such commerce was within the police power of the States; that this was absolutely necessary for the protection of the life, health, safety and well-being of the inhabitants thereof.

Mr. Chief Justice Fuller, in Wilkerson vs. Rahrer, *supra*;
The License cases, *supra*;
State vs. Delamater, this case, *supra*;
Crowley vs. Christensen, 127 U. S., 86;
U. S. vs. Roman, 33 Fed. Rep., 117;
Gray vs. Conn., 159 U. S., 74;
License Tax Cases, 5 Wall. (U. S.) 462;
Miller vs. Annon, 145 U. S., 421;
Giozza vs. Tiernan, 148 U. S,, 657;
Kidd vs. Pearson, 128 U. S., 1;
Reyman Brew. Co. vs. Bristor, 92 Fed. Rep. 17, and other cases heretofore cited.

It has thus been shown by conclusive authority that a State has a right to regulate its internal commerce, and that it is its duty to provide for the safety, health, morality and prosperity of its own citizens by suitable laws. That such regulations have always been considered by this Honorable Court to belong to the police powers of the States, as also has heretofore been shown conclusively, and that the State possesses the inalienable right to maintain and enforce throughout its jurisdiction the right to regulate its internal trade, and to maintain and enforce municipal police regulations, and thereby promote the welfare of the people. That a statute restraining an indiscriminate traffic in intoxicating liquors, and designed to protect life and health by promoting temperance and sobriety, is a Police Law, has also been conclusively shown.

"In conferring upon Congress the regulations of commerce, it was never intended to cut off the States from legislating upon all subjects relating to the life, health and safety of its citizens."

Sherlock vs. Alling, 93 U. S., 99.

"We cannot shut out of view the fact, within the knowledge of all, that the public health, the public morals, and the public safety may be endangered by the general use of intoxicating drinks; nor the fact, established by statistics accessible to everyone, that idleness, disorder, pauperism and crime existing in the country, are in some degree at least traceable to this evil. If therefore, a State deems the absolute prohibition of the manufacture and sale within her limits of intoxicating liquors, for other than medical, scientific and manufacturing purposes, to be necessary to the peace and security of society, the Courts cannot, without usurping legislative functions, override the will of the people as thus expressed by their chosen representatives."

Mugler vs. Kansas, 123 U. S., 662.

"The States may, in the exercise of their police power, in any way regulate the sale within the State of intoxicating liquors, either by prohibiting the sale entirely, * * * or by prohibiting the soliciting or taking of orders in the State for the Inter-State sale of liquors to unlicensed dealers in the State."

Westheimer vs. Weisman, 54 Pac. 332;

Missouri, K. & T. R. Y. Co. vs. Haber 169 U. S. 613.

"The question as to the constitutional power of the State to prohibit the manufacture and sale of intoxicating liquors, is a settled one in this Court."

Foster vs. Kansas, 112 U S., 201.

"Whatever effects the peace, good order, morals and health of the community, comes within its scope and everyone must use and enjoy his property subject to the restrictions which such legislation imposes."

Black on Intoxicating Liquors, §24, page 31.

"Whatever difference of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of life, health and prosperity of the citizen, and to the preservation of good order and public morals."

Id. §25, page 33.

"Finally, although the State may not assume to be the guardian of morals, it cannot be doubted that it has the power to enact measures calculated for the repression of such forms of vice as threaten its welfare by generating disease, pauperism and crime. This is signally true of the unrestricted traffic in intoxicating liquors."

Id. §26 pages 34-5.

Legislative discretion to prohibit entirely, or by means of local option, direct when and where, and under what circumstances, intoxicating liquors may be sold, is a matter so clearly within the exercise of the police power, that the proposition is no longer open to question."

Hann Brewing Co, vs. Foss (S. D.) 91 N. W., 588.

Review of all other material authorities cited by plaintiff in error to support his assignments of error in the Supreme Court of South Dakota.

There are but three cases cited by counsel for plaintiff

in error at the hearing before the Supreme Court of South Dakota, which appear to support the contention of the plaintiff in error on the real point at issue in this cause. These are

State vs. Hickox, (Kansas 1902) 78 Pa. 35,
State vs. Hanophy, (Iowa 1902) 90 N. W., 60; and
In re Bergen, (1900) 115 Fed., 339.

It will thus be seen that two of these cases were disposed of in the same year, and two years subsequent to the passage of the Wilson Act. It will also be observed that the reasoning of the Courts in these cases was founded upon decisions which were rendered during the interim between the passage of the Inter-State Commerce Act, and the Wilson Act. It will also be observed that these cases were decided prior to the decision of this Honorable Court defining the scope of the Wilson Act. Hence we hold that these decisions have been overruled by the holdings of this Court, and therefore, that they do not lay down the law as it is.

Besides this, it is proper to notice that the Hickox case, strongly relied upon by the plaintiff in error, was not based upon the point at issue in the case at bar, as will conclusively appear from the statement of that case by the Court, showing that case was based exclusively on the right to import intoxicating liquors into the State by a resident of another State.

But in

Westheiner vs. Weisman, 60 Kan., 753,

where the point at issue was substantially the same as it is in the case at bar, the Supreme Court of Kansas lays down the doctrine as follows:

"In Westheimer vs. Weisman, 60 Kansas 753, a reference was made to the provision in question and language used which treated the provision as a valid one. However, the question at issue here, *was not involved in that case.*"

From which it may readily be seen that the Supreme Court of Kansas in the Hickox case did not base its decis-

ion upon the point involved in the case at bar.

Furthermore, for the purpose of showing the real ruling of the Kansas Court upon the direct point involved in the case at bar, we will now reproduce a portion of the decision in the Westheimer case, which holds strongly in our favor, to-wit:

"Paragraph 2250 of the General Statute of 1889 is a valid police regulation. That Act is not a regulation of Commerce among the States, simply because it may *incidently* effect commerce.

"The Plaintiffs in error contend that this statute is either inapplicable to the case at bar, or that it is unconstitutional, so far as the same prohibits the *solicitation of orders* by non-residents; that in this respect, the act attempts to regulate or restrict Inter-State Commerce. **This contention is not tenable. The purpose of the act under consideration was to restrict the sale of liquors; and this may be lawfully done, although Inter-State Commerce may be thereby incidentially affected.** Railway Co, v. Haber, decided March 14, 1898, 18 Supt. Ct. 488; Plumley v. Com. 155 U. S, 461; Geer v. State of Connecticut, 161 U. S. 534. * * Under this statute, both the soliciting of an order and the making of a contract of sale are a misdemeanor. ThePlaintiffs do business in St. Joseph (Mo). Their solicting agent is also a resident of that State. He came to Kansas and procured an order of Weisman for intoxicating liquors. The order was transmitted to the plaintiff for approval or rejection. * * *The soliciting of the order,* was a violation of the letter and spirit of the statute. The section under consideration, is a *valid police regulation, and is not an infringement upon the rights of Congress to regulate inter-state commerce.*"

Therefrom it may readily be seen that the Supreme Court of Kansas, in the Hickox case, did not decide the case upon the question involved in the case at bar; for in that case, the court refers to its holdings in the Westeimer case, which did involve the same material point at issue in this case, and therein expressly upheld the po-

sition we take in the case at bar.

In the case of State v. Hanophy, *supra,* we will call attention to the essential differences between that case and the case at bar. In that case, the Iowa Court very reluctantly took a position in favor of the unconstitutionality of the law, and said that, in their opinion, the law was constitutional, but that they were bound by the decision of this court in Leisy v. Hardin, 135 U. S. 100. But it makes no difference upon what ground the Iowa Court was constrained to act in that case, for its action is not applicable to the case at bar, for it is clearly distinguished from this case in this: That it was decided under a statute which prohibited the taking of orders and made it a crime to take an order; while the South Dakota statute does not prohibit the taking of orders or make it a crime, but *licenses the engaging in the business of soliciting orders,* which is not a direct tax upon inter-state commerce, as it was in the Iowa case, but simply required a license for engaging in the business; and if the South Dakota statute imposes any restriction whatever, it is an *indirect* restriction upon inter-state commerce, which we have heretofore shown to be constitutional.

Only one other case is cited by counsel for plaintiff in error which upon first sight seems to support his position, and that is the case of in re Bergen, *supra*; but upon a close examination of the opinion, it appears beyond dispute that by reason of the difference between the statute under consideration in that case, and the statute involved in the case at bar, the holding of the court in that case cannot be considered to be of any great force in this cause. The opinion in that case was simply an oral one, delivered by one of the District Judges, and goes only to the extent of holding that the Kansas statute, which makes it a criminal offense to take or receive an order for intoxicating liquors, is a direct interference with inter-state commerce. There is absolutely nothing in the opinion in that case which is inconsistent with our contention in the case at bar. Furthermore, Mr. Justice Hook, by his language in that case, shows that he appreciates the dis-

tinction we are drawing in this case; for he specifically refers to the Westheimer case, *supra*, and said that the judgment in that case was based upon different ground. In other words, that case did not show a personal order for intoxicating liquors, but showed a practice of engaging in the business contrary to the letter and spirit of the statute, which to that extent, was a valid police regulation, and not an infringement upon the rights of Congress to regulate inter-state commerce.

However, in consideration of these three liquor cases, upon which counsel so strongly relies, it is only necessary for us to show the difference of the statutes in question therein from the statute involved in the case at bar; and this may best be done by reference to the decision of this Honorable Court in the case of People v. Walling, 116 U. S., 446. In that case this court had under consideration the identical statute involved in the case at bar, except that the Michigan Statute, then under consideration, was directed solely against the soliciting of orders by non-residents. The following is the Michigan statute under consideration in that case:

"§1. The People of the State of Michigan enact: That every person who shall come into or being in this state, shall engage in the business of selling spirituous and intoxicating, malt, brewed or fermented liquors to citizens or residents of this state, at wholesale, or of soliciting or taking orders from the citizens or residents of this state for any such liquors to be shipped into this state, or furnished, or supplied at wholesale to any person within this state, not having his, their or its principal place of business within this state, shall, on or before the fourth Friday of June in each year, pay a tax of $300.00, if engaged in selling, or soliciting, or taking orders for the sale of, such spirituous and intoxicating liquors, and $100 for malt, brewed or fermented liquors. Such tax shall be paid to the Attorney General and by him paid into the state treasury, to the credit of the general fund."

People v. Walling, 116 U. S., 446.

This Court held that statute to be unconstitutional *solely* because it discriminated between residents and nonresidents of Michigan. For that reason, and for no

other, the law was held to be unconstitutional; but the Court went on to say that if said law had included residents and non-residents alike, it would have been a constitutional statute. The decision of the Court, speaking through Mr. Justice Bradley, was concurred in by all the Justices of this Honorable Court who sat in that case, and is in the following words:

"It is suggested by the Judge, who delivered the opinion of the Supreme Court of Michigan in this case, that the tax imposed by the Act of 1875 is an exercise of the legislature of Michigan of the police power of the State for the discouragement of the use of intoxicating liquors and the preservation of the health and morals of the people. This would be a perfect justification of the Act if it did not discriminate against the citizens an products of other States in the matter of commerce between the States and thus usurp the prerogatives of the National Legislature."

This case has been used by text writers as substantiating our theory.

Freund on Police Power, §232, page 217.

We therefore insist that no authority has been presented by counsel for plaintiff in error on the hearing of this case before the Supreme Court of South Dakota which holds that the statute under consideration in the case at bar is unconstitutional. Every other authority cited by opposing counsel has had reference either to the general goods of commerce which do not come within the proper police regalation of the several States, or involve dissimilar statutes, which are not based upon occupation or business. And each and all of these have been completely overthrown by the decision of this Honorable Court.

CONCLUSION.

In conclusion, it is earnestly maintained that we have conclusively established the following enumerated propositions of history and law, to-wit:

I.- That from the first session of the Colonial Congress, in October 1765, onward to the acknowledgement of American Independence and Sovereignty by the Treaty of Paris, September 3rd, 1783, the several Colonies and States, by means of the several legislatures thereof, always controlled, regulated or entirely prohibited, the manufacture and sale of intoxicating liquors in their own respective ways, and subject to no restriction whatever by the Continential Congress.- (See this Brief, pp. 12. etc.)

II.- That from the said Treaty of Paris onward to the inauguration of our Government under our present Constitution, March 4. 1789, covering a period of exactly five years, six months and one day, the several states continued to control the liquor traffic in the same way, subject to no restriction whatever by the Federal Congress. (See this Brief, pp. 13, 14 and 15.)

III.- That from the Inauguration of the Federal Government under our present Constitution, March 4, 1789, onward to the approval of the Foreign and Inter-State Commerce Act, February 4, 1887, embracing another period of exactly 97 years and 7 months, the several States of the American Union still continued to control the liquor traffic in their own respective ways, and always and at all times subject to no restriction whatever by Congress.— (See this Brief pp. 13, 14, 15 etc.)

IV.— That these three periods of time cover the exact era of 121 years, and 4 months, during all of which time the Colonies and States respectively controlled the liquor traffic in their own way, always and at all times subject to no outside control. (Id.)

V.— From all of which we insist that, through long usage, always acquiesed in by everybody for nearly a century and a quarter of time, the absolute right of the several States to control this traffic within their own respective jurisdictions, has thereby been enacted as a fundamental provision of the unwritten Constitution of the United States of America; and that the same can be rightfully altered or changed in no way whatever, except as

provided in the written Federal Constitution.

VI.— That such amendment never has been changed by the sovereign power—the People of the several States.

VII.— That it has been conclusively shown, that the *creature* cannot be superior to the *creator*; that the people of the several States, *by States*, created the Congress; and hence, that the people of the several states by states, were the creators of the Congress; and that the Congress is simply the creature, of the States—nothing more,—nothing less.—(See this Brief, p. 12 etc.)

VIII.—That we have conclusively shown step by step, exactly how the Articles of Confederation and the present Federal Constitution were formed, and how, and under what circumstances they came to be adopted; and that, in so doing, the people of the several States reserved to each State respectively its paramount right to regulate its own police affairs in its own way, subject to no outside control.—(See this Brief, pp. 4, 5, 6, 7, 8, 9, 10, 11.)

IX.— That we always concede that Congress has the undoubted right finally to decide the outward boundaries of the rightful police power of the States; otherwise, endless confusion would follow. But when Congress and this Honorable Court have once marked the boundary of police power, and have laid down the doctrine that the traffic in intoxicating liquors comes within the police power of the States, that then and in that case the rights of the States, under their respective police powers, at once becomes absolute; and that, thereafter, Congress has, and can have, no right whatever to interfere with the laws of the several States which control and regulate this traffic.—See this Brief, p. 25.)

X.—That we have conclusively shown by the non-action of Congress during more than a century of time, and by the affirmative action of this Honorable Court by its decisions in the license cases, *supra*, and many other

cases heretofore cited, that the Federal Government has thereby determined and decided that the traffic in intoxicating liquors comes within the proper and legitimate police powers of the several States; and that, in so doing, the legislatures of the several States are not encroaching or usurping any of the powers delegated to the government through the Federal Constitution.—(See this Brief, pp. 39-46.)

XI.—That we have conclusively shown, from the decisions of the courts of last resort of the several States, that each State has always exercised the right to control the traffic in intoxicating liquors within its own jurisdiction, in its own way, and so as best to subserve the welfare of its own people.—(See this Brief, pp. 13, 14, 15, 37, 38, 39, 46, 47, 48, 49, 50, 51, 52, etc.)

XII.—That we have also shown that immediately following the passage of the Inter-State Commerce Act, the wholesale dealers in intoxicating liquors at once took the position that, inasmuch as Congress had now spoken on the question of Inter-State Commerce, that the States were thereby deprived of the right in any way to regulate the traffic in intoxicating liquors.—(See this Brief, pp. 16, 17, etc.)

XIII.—That thereupon, finding that the intention of Congress, in the passage of theInter-State Commerce Act, was thus being misconstrued by the wholesale liquor dealers and others, Congress came to the rescue of the people and passed the well-known Wilson Act for the purpose of defining the true intention of Congress in the passage of the Inter-State Commerce Act; that by the terms of the Wilson Act, the rights of the several States to control the liquor traffic within their own several jurisdictions was thereby specifically recognized.—(See this Brief, pp. 19, 20, 21, 22, 23.)

XIV.—That we have conclusively shown that the

decisions, relied upon by plaintiff in error, which came out during the interim between the passage of the Inter-State Commerce Act and the Wilson Act and other decisions based thereon, do not lay down the law correctly, according to the holding of this Honorable Court.—(See this Brief, pp. 31, 32, 33, 34, etc.)

XV.—That we have conclusively shown that a license law is not a tax law and hence, that the States have a right to enact license laws regulating suitable occupations, and that such laws are not in conflict with §8, article 1 of the Federal Constitution.—(See this Brief, pp. 62, 63, 64, 65, 66, 67, 68, 69.)

XVI.—That it has been conclusively shown that the statute under which the plaintiff in error was convicted in the trial court, is a License and not a Tax Law; hence, it does not provide for any tax upon inter-state commerce, and in no wise conflicts with §8 of article 1 of the Federal Constitution.—(See this Brief, pp, 55, 56, 57, 58-9.)

XVII.—That the South Dakota statute under which the plaintiff in error was convicted in the trial court, makes no discrimination whatever, either in favor of or against, the inhabitants of South Dakota or any other State; and hence that, under the decision of this Honorable Court in People v. Waliing, 116 U. S. 446, does not conflict with §8, of article 1, of the Federal Constitution, and hence is a valid statute.—(See this Brief, pp. 55, 56, 57, 58-9.)

XVIII.— We have also shown that, by the continuous and exclusive control by the several Colonies and States of the traffic in intoxicating liquors throughout an era of more than 121 years, prior to the passage of the Inter-State Commerce Act, the several States had thereby unanimously enacted an unwritten amendment to the constitution declaratory of the absolutely reserved rights of the States to control the liquor traffic in their own way subject to no outside control whatever; and that such, amendment, so made is just as binding upon the Federal

Government as is the unwritten constitution of England upon Great Britain that such amendment so made, can neither be changed nor abrogated, except in the manner provided in the Federal Constitution,—(See this Brief, pp. 25, 26, 27, 28, 29, 30. etc.)

XIP.— That we have shown beyond successful contradiction, by the decisions of this Honorable Court, the traffic in intoxicating liquor comes peculiarly within the police powers of the several States: that the exercise of Federal Jurisdiction thereover would result in the repeal of more wise legislation enacted by the several States than Congress would be likely to enact for a century to come; and that, as a matter of practical fact, Congress would be entirely unable properly to deal with this matter so as best to subserve the welfare of each of the several States.—(See pp. 26, 34.)

"It is hardly possible for Congress to deal at all with the details of this important matter."—(Mr. Justice Catron in the License Cases, 5th How., page 569.—" It is the undoubted and reserved power of every State here, as a political body to decide, independent of any provisions made by Congress, * * what kind of property and business it will tolerate and protect." —(Mr. Justice Woodbury, in license cases, 5th How. 659."—It has been frequently decided by this Court, that the powers which relates to merely municipal regulation, or what may more properly be called internal police, were not surrendered by the States, or restrained by the Constitution of the United States; and that consequently, in relation to these **the authority of a State is complete, unqualified and conclusive."** (Mr. Justice Grier, Id.) "The power of the State to impose restraint and burdens upon persons and property in conservation and promotion of the public health, good order and prosperity, **is a power originally and always belonging to the States, not surrendered by them to the general government, nor directly restrained by the constitution of the United**

States, and is essentially exclusive."—Mr. Justice Fuller, of this Court, in delivering the opinion in Wilkerson v. Rahrer, 140 U. S. 574. (See this Brief pp. 33.)

XX.— That we have conclusively shown that Congress has not, and never had, the *exclusive* right to regulate inter-state commerce; but that the several States have at all times since the adoption of the Constitution, as they certainly did prior thereto, continued to regulate inter-state commerce in their own way, relative to all matters which are local and not national in character, except that they could rightfully levy no tax thereon, or interfere with the rightful regulation thereof by Congress relative to all matters which are national and not local in character.—(See opinion of Mr. Justice Catron, of this Honorable Court, pp. 26, 27 and 28 of this Brief.)

Finally we feel it incumbent upon us to say that the State of South Dakota and all her people are vitally interested in sustaining the statute in question in all its parts and provisions. That the people in every State in the American Union are likewise interested in State control of the traffic in intoxicating liquors. That, in good faith, the legislature of the State of South Dakota has sought to restrain and regulate a traffic, the evils of which have been so well protrayed by this Court. That in furtherence of the welfare of the people, and in full accord with the inherent rights of a sovereign State, this law is now aiding in the regulation of a traffic, the existence of which is certainly a menace to thousands of homes. That we insist we have clearly shown that the decision of the Supreme Court of South Dakota, affirming the conviction of the plaintiff in error in the Court below, was and is both legally and morally just and right; and that we have a right to insist that that decision should be affirmed by this Court, with costs of suit.

Finally in the name and on the behalf of pratling children, clad with innocence, playing around the firesides of untold thousands of homes through-out all America, we

make this final appeal to this most Honorable Court to sustain and uphold the judgment of the highest Court in our State, the citadel of our welfare,—the Gibraltar of our safety.

All of which is respectfully submitted.

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